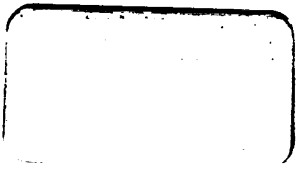

PACIFIC COAST LAW JOURNAL,

CONTAINING ALL THE

Decisions of the Supreme Court of California,

AND THE IMPORTANT DECISIONS OF THE

U. S. CIRCUIT AND U. S. DISTRICT COURTS FOR THE DISTRICT OF CALIFORNIA, AND OF THE U. S. SUPREME COURT AND HIGHER COURTS OF OTHER STATES.

W. T. BAGGETT, EDITOR.

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ERRATA.

1. Syllabus in *Berryman* vs. *George C. Perkins, Governor*, page 720, should read: "Mandamus. This is *not* the proper remedy to compel the Governor to approve the valuation of property sought to be condemned under the Act of 1875–6 to provide for a supply of water for the University, and for the Asylum for the Deaf, Dumb, and Blind," instead of "is the proper remedy," etc.

2. In *In re Boland*, page 708, the names of Tubbs & Cole, of Sacramento, should be added as attorneys for respondent.

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Current Topics.

WE are requested by the ex-Reporter of the Supreme Court to call attention to some slight errors in the 53d volume of California Reports. In the table of cases, the case of *Powers* vs. *Leith*, reported at page 711, is omitted. At page 245 the first word of the head-note is misprinted "service" for "issue;" and in the second line of the same head-note the word "served" should be "issued." The report of the case and the opinion show that these are errors. At the top of page 793 the word "Banks" should be omitted.

THE Legislature is not making as rapid progress with its work as the public interests seem to demand. More than half the session is now gone, and very few matters of importance have been matured. It will require careful attention to business, and less talking during the remaining half of the session, to do justice to the legislation so much needed.

Supreme Court of California.

DEPARTMENT NO. 2.

[Filed February 1, 1880.]

[No. 6079.]

CHAMBERLAIN

vs.

PACIFIC WOOL GROWING CO., A CORPORATION.

MAKER OF PROMISSORY NOTE. A promissory note signed by D. P. Sackett, President Pacific Wool Growing Company—Sackett having a personal interest in the loan—is not the note of the corporation, but the individual note of Sackett.

A TRUSTEE or agent cannot be permitted to deal with his trust adversely to the interest of his beneficiary.

EVIDENCE OF DISSENT BY BENEFICIARY. Where a loan had been made for a corporation by the casting vote of the President, he being interested, and subsequently after he had resigned the Board of Trustees voted to reconsider and to repudiate the loan: *Held*, that the record of the proceeding was admissible to show the corporation did not consent.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

J. C. Bates, for the appellant.

Sawyer & Ball, for the respondent.

By the Court, MYRICK, J.:

This is an action upon a promissory note, dated July 29, 1875, for $850, and interest at one per cent. per month. The note is signed "D. P. Sackett, President Pacific Wool Growing Company," and is in terms made payable to the order of plaintiff. The complaint alleges that the note was executed for money loaned by plaintiff to defendant through its then President, D. P. Sackett; that the money was used by Sackett for the use and benefit of defendant, and that after the loan and use of the money defendant assumed the loan, and ratified and confirmed the action of the President in making the loan and giving the note. Another count is added for $850 lent and advanced to defendant. The jury rendered a verdict for plaintiff for $850 and interest at one per cent. per month; total $1,046.40. Defendant moved for a new trial, which was denied, and defendant appealed.

From the bill of exceptions contained in the transcript it appears: From January 1, 1875, to October 14, 1875, Sackett was the President of defendant, and during that time, and until commencing this suit, he was the agent of plaintiff, who had been, ever since January, 1875, traveling in Europe. Sackett, as the agent of plaintiff, claimed to have made the

loan of $850 to defendant by himself, as its President, without consulting with any of the directors or trustees of the corporation, or with plaintiff, and he (Sackett) executed the note in suit. He kept the note in his possession until this suit was commenced, when he placed it in the hands of an attorney for collection. There had been no action of the corporation fixing any compensation of Sackett as its President, but he applied $507 of the $850 towards payment for his services. There were five trustees of the defendant, of whom Sackett was one. At a meeting of the trustees held September 25, 1875, the five were present; and "it was moved and seconded that the action of the President be ratified in making the loan of $850 of Mrs. M. Z. Chamberlain." The record continues: "Carried. Ayes—McChesney, Hawlsey; noes—Durkin and Hallinan; Mr. President (Sackett) gives the casting vote."

Sackett testified that he had been the agent of plaintiff to loan money for several years, and had loaned at least $20,000 for her without special instructions, and this loan was made in the usual way. He says that $507 of the $850 was used to pay his salary as President, at the rate of $125 per month; that the balance was used to pay bills of the corporation; $1,059 is charged for his salary from January 1, 1875, to October 14, 1875, when he "sold out to Mrs. Hawes and resigned." Taking the testimony together, it appears that the whole $850 was taken by Sackett on account of his salary.

No further action was had by the defendant until January 4, 1876. Defendant offered to prove by the record that at a meeting of the then trustees, held January 4, 1876, the Board of Trustees read and reconsidered the proceedings of the meeting of September 25, 1875, and so much of the proceedings whereby the loan of $850 by D. P. Sackett, acting as President, was approved, was vacated and set aside; that the trustees were imposed upon by said Sackett in charging $125 per month as salary as President, and it was carried unanimously (three new trustees being in); that the pretended loan of $850 was made for his individual use and benefit, and not for the benefit of the company, and therefore the company would not pay it. Plaintiff objected to the evidence; the objection was sustained, and defendant excepted.

So much as to facts. The law applicable thereto is briefly stated. C. C., section 2230: "Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has

an interest, present or contingent, adverse to that of his beneficiary, except as follows." This case is not within the exceptions.

The note declared on was not the note of defendant; it was the note of Sackett. The words "President Pacific Wool Growing Co." following the signature "D. P. Sackett," are description of the person merely. (*Conner* vs. *Clark*, 12 Cal. 168; *Hall* vs. *Auburn T. Co.*, 27 Cal. 256.) The loan was not ratified by the corporation. Two of the trustees voted "aye," and two voted "no." Sackett gave the casting vote "aye." Sackett's vote was a nullity. He was personally and directly interested. He endeavored by his vote to change the liability (if there was any) of the company to himself for his unliquidated demand to a liability to the plaintiff for money loaned. In other words, he, as agent of plaintiff, advanced money to himself to pay a claim which he made against defendant, and which his own vote, as trustee of defendant, was used to endeavor to adjust.

If he failed to properly account to plaintiff for the $850, he would be liable to her for it. He endeavored to relieve himself of that liability to plaintiff by voting that defendant owed him, and that the money had been properly used to pay that debt.

Defendant was entitled to have the evidence relating to the meeting of January 4, 1876, go to the jury; not for the purpose of showing that the proper action of one board may be annulled by a succeeding board, but for the purpose of showing that the corporation did not, by silence, give consent, and that its voice, when first heard, was used to repudiate the transaction.

Judgment and order reversed, and cause remanded for a new trial.

DEPARTMENT NO. 1.

[No. 5870.]

[Filed February 16, 1880.]

SHAY vs. McNAMARA.

DEEDS VOID for want of consideration and for palpable fraud.

PRIVIES TO JUDGMENT. Only those are privies to a judgment whose interest in the subject matter of the suit originated subsequent to its commencement.

THE DOCTRINE OF RELATION cannot be resorted to for the purpose of holding a party bound by a judgment fraudulently procured.

Appeal from the District Court of the Ninteenth Judicial District, San Francisco County.

Wm. M. Pierson, and *Jarboe & Harrison*, for the appellant.
Williams & Thornton, for the respondent.

By the Court, Ross, J.:

Thomas C. and Johanna Johnson were married October 24, 1858. On the 10th of January, 1866, the lot of land in controversy was conveyed to Thomas—the consideration therefor being paid out of their common property. On the next day Johnson and wife united in the execution of a mortgage on the lot to the California Building and Loan Society, to secure the payment of a certain sum of money. The money not having been paid, an action was afterwards commenced in the Twelfth District Court to foreclose the mortgage, to which action Johnson and wife were made parties defendant; and such proceedings were had in that action that on the 22d of March, 1872, a decree of foreclosure, in the usual form, was duly entered. Under this decree the lot in question was sold by the Sheriff on May 17, 1872, to one Michael J. Kelly, who made the purchase at the verbal request of, and for, Johnson and wife. The purchase money was advanced by Kelly out of his own funds at the request of, and for, Johnson and wife; and the money so advanced is still due and owing to him from them. On the day of sale the Sheriff, at the request of Michael, executed to his brother, Martin Kelly, a certificate of purchase for the lot. August 17, 1867, Johnson and wife declared a homestead upon the premises.

In 1870, and before the taxes for the fiscal year 1870-71 became delinquent, Thomas C. Johnson "furnished" to one Bartholomew J. Shay, the husband of plaintiff, sufficient money to pay the taxes on the lot for that fiscal year, and Bartholomew undertook and promised to pay the taxes. He, however, failed to do so; and in consequence of such default the taxes became delinquent, and on the 3d day of January, 1871, the lot was sold by the Tax Collector for taxes to one Murdock, who received the tax certificate therefor. On the 18th of May, 1872, Murdock assigned the tax certificate to one Charles H. Morgans, who on the same day (the time for redemption having expired) received a deed for the lot from the Tax Collector. The consideration for the assignment of the tax certificate by Murdock to Morgans was paid by Bartholomew J. Shay, and the assignment of the certificate, as also the tax deed, was made to Morgans by the procurement and for the benefit of Bartholomew. On the 22d of May, 1872, Morgans, at the request of Bartholomew J. Shay, and without any consideration being paid to him, executed to the

plaintiff, Mary A. Shay, a deed for the lot, which deed expressed the consideration of "love and affection," and was in reality for the benefit of Bartholomew. On the day previous to the execution of the deed to plaintiff—that is to say, on the 21st of May, 1872—Morgans commenced an action in the Nineteenth District Court against Martin Kelly and two fictitious defendants, to quiet his alleged title to the lot. Kelly answered in the action, denying title in Morgans and setting up his own rights under the Sheriff's certificate, which he averred was the only interest he had in the property. A trial was afterwards had, resulting in the entry, on the 8th of August, 1872, of a decree in favor of Morgans, adjudging him to be the owner in fee of the premises, and enjoining Martin Kelly and all persons claiming under him from asserting any interest therein, and especially from setting up any rights under the Sheriff's certificate of sale, or by virtue of any deed issued thereon.

After the entry of this decree—namely, on the 19th of November, 1872—the Sheriff executed to Martin Kelly a deed for the lot.

On the 24th of January, 1872, Thomas C. Johnson executed to Bartholomew J. Shay a power of attorney, authorizing the latter to sell and convey the lot. On the 7th of November thereafter, Bartholomew J. Shay, by virtue of the power thus conferred, executed to Morgan a deed for the lot, which deed expressed a consideration of one dollar, but was, in fact, made without any consideration, and without the knowledge of Morgans, and in reality for the benefit of Bartholomew J. Shay.

The defendant, McNamara, is a tenant in possession under Johanna Johnson, and the present action is ejectment brought in the name of Mary A. Shay to recover possession of the lot from McNamara and Johanna. The defendants answered, denying title in plaintiff, and also filed a cross-complaint averring substantially the facts above detailed, which were, by the Court below, found to be true. The appeal is from the judgment on the judgment roll, and the plaintiff, who is the appellant, relies for a reversal—first, upon the tax-sale and the conveyances made thereunder; and secondly, upon the decree in the suit of *Morgans* vs. *Kelly*, as being conclusive upon the rights of the present parties.

1. The facts, as found by the Court below, present a case of palpable fraud upon the part of Bartholomew J. Shay; and as the case is presented, we cannot review the questions of fact. Neither Morgan nor the plaintiff was a purchaser in good faith or for value, and neither of them acquired any in-

terest in the property in question. In their connection with the transactions, both were mere instruments of Bartholomew J. Shay in his fraudulent attempt to acquire the property of Johnson and wife, and the Court below correctly adjudged null and void the deeds mentioned in the decree.

2. Nor are the defendants concluded, or in any way affected, by the judgment in *Morgans* vs. *Kelly*. In bringing that action Morgans was but the representative of Bartholomew J. Shay. At the time it was commenced, the legal title to the lot was in Johnson and wife. Neither of them was made a party to the action; and, of course, unless they are privies, neither is any way bound by it. The only real defendant to the action was Martin Kelly, the holder of the Sheriff's certificate of purchase; and the only claim he set up in his answer therein was such rights as arose under the certificate.

It was claimed at the argument on behalf of appellant, and is also claimed in the brief on file, that the money paid by Michael J. Kelly for the lot at the foreclosure sale was paid out of his own funds, and was not a loan to Johnson and wife, and that therefore there could be no resulting trust in their favor. If that be so, then it follows that Johnson and wife derived no title or interest under either of the Kellys, and cannot therefore be privies.

But, on the other hand, if the advance by Michael J. Kelly be considered a loan to Johnson and wife, and it be further considered that with the money so loaned he made the purchase at their request and for their benefit, the result must remain the same. In that view there arose *upon the purchase* a resulting trust in favor of Johnson and wife, and Martin Kelly thereupon took the certificate of purchase in trust for them. This was the *origin* of whatever interest the Johnsons acquired under the Kellys; and having originated before the commencement of the suit, *Morgans* vs. *Kelly*, it follows that they are unaffected by the judgment in that action; for only those are privies whose interest in the subject matter of the suit originated *subsequent* to its commencement. (Freeman on Judgments, sec. 162; *Campbell* vs. *Hall*, 16 N. Y. 575-9; *Doe* vs. *The Earl of Derby*, 1 Ad. and E. 783; *Winslow* vs. *Grindell*, 2 Greenl. 64; 2 Smith's Leading Cases, p. 825.)

Treating Martin Kelly as a trustee for the Johnsons, the present case does not come within any of the exceptions to the general rule that trustees and their *cestuis que trust* are regarded as being so independent that proceedings against one has no effect upon the other. In addition to their equity, they held *the legal title* at the time of the commencement of

the suit of *Morgans* vs. *Kelly*, as also at the time the judgment in that case was entered.

It is said, however, for appellant, that the subsequent execution of the Sheriff's deed established the title of Martin Kelly to the premises as of the date of the foreclosure sale, and transferred to him as of the date of the mortgage all the interest of the Johnsons; and that the judgment in *Morgans* vs. *Kelly* relates to the time of the commencement of that action, and establishes the respective rights of the parties of that date. But this would be putting the doctrine of relation to a use not sanctioned by law. That doctrine, as observed by the Supreme Court of the United States in *Gibson* vs. *Chauteau*, 13 Wall. 101, "is a fiction of law adopted by the courts solely for the purposes of justice," and we think it cannot be resorted to in this case for the purpose of holding the defendants bound by the judgment in favor of the representative of Bartholomew J. Shay.

The judgment must be affirmed, and it is so ordered.

DEPARTMENT No. 1.

[No. 6119.]

[Filed February 14, 1880.]

McCREERY vs. EVERDING.

EJECTMENT—TITLE PARAMOUNT must be distinctly shown in defendant to enable him to hold possession as against a plaintiff in execution.

Appeal from the District Court of the Twelfth Judicial District, San Francisco.

Defendant Leavitt appealed from an order denying his motion to vacate or stay the execution of a writ of possession in favor of plaintiff.

E. A. Lawrence, for the appellant.

Wilson & Wilson, for the respondent.

By the Court, McKINSTRY, J. (from the bench):

The order denying the motion to vacate or stay the execution of the writ of possession must be affirmed. It is true that one in possession claiming under title paramount to, or independent of, that of the plaintiff in execution, cannot ordinarily be amoved by the Sheriff under the writ. But the nature of the claim of Leavitt, the moving party, while he pretends to assert it, does not appear from his affidavit. It may be premised that, on the trial of the ejectment, one Dowling was a party defendant, and that judgment went against

him. In his affidavit Leavitt, after suggesting an independent title in Carter, and that he, the affiant, deraigns from Baugh, swears that pending the ejectment "the said original possession of said Carter was (on affiant's information and belief) obtained by said Baugh upon compromise of a suit of said *Carter* vs. *Dowling*," etc. If this means anything, it may mean that the result of such compromise was a recognition of a better right in Dowling by Carter, or a mutual interchange of deeds by Carter and Dowling to undivided portions of the disputed premises; in either of which or other cases that may be imagined, Leavitt holds under Dowling. It is certainly not a distinct statement of the nature of Leavitt's right, if he has any; and its ambiguity bears the marks of such premeditation as justified the Court below in refusing to base an order upon it. We think the Court was right.

Order affirmed.

DEPARTMENT No. 1.

[Filed February 14, 1880.]

[No. 6120.]

McCREERY vs. EVERDING.

MISNOMER MUST BE PLEADED. If a party appear and defend under a name other than his real, without making his true name known, he and those claiming under him will be bound by the judgment.

Appeal from the District Court of the Twelth Judicial District, San Francisco County.

E. A. Lawrence, for appellants.

Wilson & Wilson, for respondent.

By the Court, MCKINSTRY, J. (from the bench):

This, like the case just decided, is an appeal from an order refusing to stay the execution of a judgment in *ejectment*. The appeal was taken by one E. A. Lawrence and Ann Connolly.

Mr. Lawrence, of counsel (one of the appellants), presents the point that the surname of one of the defendants in ejectment, who was sued and served and who appeared in the action (by the same Mr. Lawrence as his attorney) under the name of *Rinaldo Swartzenberger*, was not Swartzenberger, but Rinaldo only. There is no dispute that the *man* who appeared as defendant in ejectment—whether Rinaldo with or without *Swartzenberger*—was the tenant of Ann Connolly, one of the moving parties in the Court below, and that she or her husband conducted the defense in the name of her

tenant. This is not the case of a suit against a defendant by a fictitious name. The defendant Swartzenberger did not plead a misnomer in abatement, but admitted his name to be Swartzenberger, as did Ann Connolly, who conducted the defense for him. Mr. Lawrence claims under a conveyance from Mrs. Ann Connolly, and both are bound by the judgment against Swartzenberger.

Order affirmed.

DEPARTMENT NO. 1.

[Filed February 16, 1880.]

[No. 5962.]

SPIERS vs. DUANE.

SCRAMBLING POSSESSION. By scrambling possession is meant a struggle on the land itself—not such as is waged in the courts.

PRACTICE ON APPEAL. Objection to the sufficiency of the pleadings cannot be made for the first time in the Supreme Court.

Appeal from the County Court of the city and county of San Francisco.

Geo. Turner and *John Wade*, for appellant.

W. Olney and *C. P. Robinson*, for respondent.

By the Court, Ross, J.:

The evidence is sufficient to sustain the verdict and judgment as to all of the defendants except Epstein.

It was shown upon the trial that the lot in question was inclosed with a board fence and had a house upon it; that a tenant of plaintiff lived with his family upon the premises from May 25, 1872, to April 27, 1876; that on the 26th of April the tenant began to move therefrom, finished moving the next day, locked the doors of the house, and on the following day (the 28th) surrendered the keys to the plaintiff. The day succeeding, this being Saturday, and plaintiff being desirous of raising the house, he caused the necessary material for that purpose to be placed on the lot, with the intention of commencing work the following Monday morning. During the intervening Sunday night the entry complained of was made.

The possession thus shown in plaintiff was sufficient to entitle him to maintain the action, and was not in any sense a scrambling possession, as contended by appellants. By a scrambling possession is meant a struggle for possession on the land itself—not such contest as is waged in the courts.

The papers in the action of *Voll* vs. *Walsh*, *Welton* vs. *McNear*, and *Butter* vs. *Voll*, were property excluded under objections on the part of plaintiff. None of those cases had any bearing upon the question in the present action, for the reason just suggested. The other objections sought to be made to the rulings of the Court below are too vague and indefinite to be noticed.

As respects the defendant Epstein, the evidence fails to connect him with either the forcible entry or forcible detainer. This was virtually conceded by respondent's counsel at the argument, but it was contended by them that Epstein's answer in effect admitted the forcible detainer, and that therefore no proof as to him was necessary. But Epstein's answer was the same as that of the other defendants, all having answered together; and plaintiff tried the case in the Court below upon the theory that the answer was sufficient to put in issue all of the material allegations of the complaint, and endeavored to prove Epstein's connection with the forcible entry and forcible detainer. Under such circumstances it is the settled rule that objection to the sufficiency of the pleading cannot be made for the first time in this Court. (*Cave* vs. *Crafts*, 53 Cal. 135.)

It results that the judgment and order must be affirmed as to all of the defendants except Epstein, and that as to him the judgment and order must be reversed and the cause remanded for a new trial. So ordered.

DEPARTMENT NO. 2.

[Filed February 17, 1880.]

[No. 6071.]

MILLER vs. SHARP.

PARTITION. In partition an appeal will not lie when there is no interlocutory decree.

Appeal from the District Court of the Third Judicial District, San Francisco County.

Geo. F. & W. H. Sharp and *Hunt & Rising*, for appellant.

P. B. Ladd, for respondent.

BY THE COURT:

This is an action brought for partition of land. The document appealed from is the finding of facts by the Court and the conclusions of law, which do not constitute an interlocutory decree. No decree appears as yet to have been made. There is, therefore, nothing from which to appeal.

The appeal is dismissed.

DEPARTMENT NO. 1.

[Nos. 6504 and 6665.]

[Filed February 18, 1880.]

IN THE MATTER OF THE FIFTEENTH AVENUE EXTENSION.

TIME OF SERVING notice of appeal and proof of service considered.

Appeal from the County Court of the city and county of San Francisco.

M. Mullany and *A. D. Splivalo*, for appellants.

James L. Crittenden, for the respondent, moved to dismiss the appeal. He said:

"The last judgment appealed from was entered as of the 5th of October, 1877, the time when the decree was made, confirming the report of the Board of Fifteenth Avenue Extension Commissioners. That decree directed the entry of all the judgments. Then, subsequently, on the 8th of February, 1878, a motion was made for an order that they be entered as of the date when that decree was made—the 5th of October—and the order was made *nunc pro tunc*."

Mr. Mullany, for appellant—The judgment is dated February 8th.

MCKINSTRY, J.:

The judgment was, in fact, entered February 8, 1878, and the notice of appeal filed and served within the year prescribed by statute. The circumstance that the order was made *nunc pro tunc* cannot affect the question. We all agree that the notice of appeal was served within a year after the entry of the judgment.

Mr. Crittenden—My next point is that there was no notice of appeal served in this case.

Mr. Mullany—I have here an affidavit of the serving of the notice of appeal by delivering it with the clerk at the office of the counsel.

Mr. Crittenden—I have two affidavits that no service was made—my own, and the affidavit of my clerk.

Mr. Justice McKinstry—We must be guided by the evidence of service contained in the transcript.

Mr. Crittenden—My next point is that this transcript does not contain all of the judgment roll in the case. We make the suggestion of a diminution of the record.

Mr. Justice McKinstry—That is not a ground of motion to dismiss the appeal.

Mr. Crittenden—The grounds of my motion to dismiss are the same in each case.

The Court—Let an order denying the motion be entered in each case.

DEPARTMENT NO. 2.

[Filed February 19, 1880.]

[No. 6833.]

ROOT, NEILSON & CO. vs. A. S. BRYANT.

SUFFICIENCY OF UNDERTAKING ON APPEAL. Where the property involved is not perishable property, the undertaking prescribed by section 941, C. C. P., is sufficient to stay proceedings.

Appeal from the District Court of the Sixth District, Sacramento County.

W. W. Cope and *Geo. E. Bates*, for the motion.

Warren Olney and *A. C. Freeman*, *contra*.

BY THE COURT:

The plaintiffs brought this action to foreclose a mechanics' lien upon certain saw-mill property, and impleaded the London and San Francisco Bank as a party holding a subordinate lien upon the same property. The action was tried, and a decree entered by which it was ordered that the property be sold, and that Root, Neilson & Co. be first paid their claim in full out of the proceeds of the sale, and that the claim of the London and San Francisco Bank be paid out of the surplus, if any remained. The bank moved for a new trial, which was denied; and from that order and the judgment it has appealed to this Court. It is stipulated in the transcript "that a sufficient undertaking on appeal has been properly filed, and in due form." The undertaking filed is the one prescribed by section 941, C. C. P. The plaintiffs do not deem that sufficient to stay proceedings pending the appeal, and have caused an execution to issue and delivered it to the Sheriff, with directions to proceed and sell the property under the decree. To prevent that, this motion is made on behalf of the bank for an order staying proceedings pending the appeal.

This, in our opinion, is not a case provided for in sections 942, 943, 944, or 945 of the Code of Civil Procedure, and therefore the undertaking filed is sufficient to stay proceedings pending the appeal, as it does not appear that the property which the Sheriff is about to sell is perishable property.

The motion for an order staying all proceedings upon the judgment in said action, pending the appeal therefrom, is therefore granted.

IN BANK.

[Filed February 19, 1880.]

[No. 10,477.]

THE PEOPLE vs. CHARLES COLBY.

JURISDICTION OF SUPERIOR COURTS. After the first day of January, 1880, the Superior Courts of California, created by the Constitution adopted in 1879, succeeded to the jurisdiction of the District Courts in existence at the time of the adoption of said Constitution.

Appeal from the Superior Court of Santa Cruz County.

(The report of the former appeal will be found on page 333 of the last volume of the JOURNAL, and the modified opinion upon denying the rehearing on page 428 of same volume.)

Lesser, Hinds & Terry, for appellant.

Attorney-General, for respondents.

By the Court, MORRISON, C. J.:

This is an appeal from an order made by the Superior Court in and for the county of Santa Cruz, on the 19th of January, 1880, whereby the said Superior Court fixed a day to carry into execution a certain judgment in the above case, rendered by the late District Court of that county on the 17th day of June, A. D. 1879. It appears from the transcript that the defendant was, on the said 17th day of June, 1879, convicted of the crime of murder in the District Court of the Twentieth Judicial District, in and for the said county of Santa Cruz, and sentence of death passed upon him on the 20th of June, 1879. From the said judgment defendant appealed to this Court, and on the 18th day of November, 1879, the judgment of the Court below was affirmed, and said Court was ordered to fix a day for carrying the sentence into execution. A petition for rehearing in the said cause was duly presented, and on the 22d day of December, 1879, the same was denied. On the 19th day of January, 1880, the defendant was brought before the Superior Court in and for the said county of Santa Cruz for sentence; and being asked if he had any legal reasons to show why said judgment should not be executed, presented the following objections:

"1. That the order of the Supreme Court to fix the day for carrying the sentence of death, passed on the defendant by the District Court of the Twentieth Judicial District of the State of California, in and for the county of Santa Cruz, into effect, was directed to the said District Court, and the

remittitur was filed in the said Court; and that said Court, and no other, had the power to fix a day for carrying said sentence into execution.

"2. That this Court never acquired jurisdiction in this case, and has none.

"3. That the paper purporting to be an indictment against the defendant is a mere nullity, because it was not found by a grand jury, but by a body of men who usurped the functions of the grand jury, without any authority or color of authority.

"4. That all of the proceedings based upon said pretended indictment are null and void.

"5. That there is no law of this State giving this Court authority to act in this case."

The foregoing objections were overruled by the Superior Court; and that Court having passed sentence of death upon the defendant, he has taken this appeal, and assigns as error the ruling of the said Superior Court overruling his said objections.

The third and fourth objections—that the paper purporting to be an indictment against the defendant is a mere nullity, because it was not properly found—were involved in the former appeal, and were passed upon by this Court. They are not, therefore, proper subjects of inquiry at this time. The other objections simply involve the power and authority of the Superior Court of Santa Cruz County as the successor of the District Court.

Section 1, Article 6 of the Constitution creates Superior Courts, and section 5 of the same article vests such Courts with jurisdiction in criminal cases amounting to felony. Section 3 of Article 22 provides that: "All Courts now existing, save Justices' and Police Courts, are hereby abolished; and all records, books, papers, and proceedings from said Courts as are abolished by this Constitution, shall be transferred, on the first day of January, 1880, to the Courts provided for in this Constitution; and the Courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced and filed or lodged therein."

We are of opinion that after the first day of January, 1880, the Superior Court of the county of Santa Cruz succeeded to all the powers theretofore vested in the District Court, and that it had full jurisdiction over the case now in hand.

Order affirmed, and remittur to issue forthwith.

McKinstry, J., and McKee, J., expressed no opinion.

DEPARTMENT NO. 2.

[Filed February 17, 1880.]

[No. 6117.]

BUTLER vs. BABER.

NOTE BY MARRIED WOMAN. Under section 167 of the Civil Code, as originally adopted, a married woman had no power to execute a promissory note for the payment of money.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

A. B. Searle, for appellant.

S. D. Woods, for the respondent.

By the Court, MYRICK, J.:

This is an action upon a promissory note signed by Fanny Baber and A. J. Baber, who were husband and wife. The note is dated March 12, 1874. There is an endorser. The Court below rendered judgment against all the defendants, and on motion granted a new trial as to Fanny Baber on the ground that she was a married woman at the time the note was executed, and not liable thereon. From this order plaintiff appealed.

At the time the note was executed, section 167, C. C., read thus: "A wife cannot make a contract for the payment of money."

The effect of this section is claimed to be modified by sections 158, 159, 162, 171, and 1556, C. C., and section 370 C. C. P.

We do not see that the sections referred to at all modify section 167. Those sections refer to property, and authorize the wife to make contracts relating thereto, and to pursue her remedy in cases where theretofore she had not the power to act by herself.

It is true that, under section 17, C. C. P., the words "personal property" include money; which is claimed to place money within section 158, C. C., and so authorize a married woman to make a contract in reference to money—*i. e.*, to pay money; but as section 167, as above quoted, refers to that very subject directly, it will prevail over any inference that might otherwise be drawn from other sections, and withdraws money from the effect of the word property, as used in section 153, C. C.

We are of opinion that, during the time section 167, as above quoted, was in force, she had no power to execute the note in question.

Order affirmed.

DEPARTMENT. NO. 2.

[Filed February 19, 1880.]

[No. 6160.]

BRADY vs. FEISEL.

JUDGMENT ON THE FINDINGS. Where a judgment is rendered in favor of a party on the findings, if he is not satisfied with the findings, he must move for a new trial within the statutory period, or he cannot subsequently impeach them on the ground that they are not sustained by the evidence.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

J. M. Mongues, for appellant.

C. H. Parker, for respondent.

By the Court, THORNTON, P. J.:

This case came before the Supreme Court on appeal from the judgment, and was decided on the 6th day of November, 1877. (See report of it in 53 Cal., at page 49.) The Court on the appeal reversed the judgment, and remanded the cause with directions to enter judgment for the plaintiff on the findings. The remittitur was ordered to be issued forthwith. On the return of the remittitur to the Court below, and its filing therein, that Court entered a judgment as directed for the plaintiff. This was done on the 9th day of November, 1877. On the 19th day of the same month the defendant filed and served notice of intention to move for a new trial, on grounds designated in the notice, and afterwards prepared a statement on motion for a new trial, which appears to have been regularly settled by the Judge on the 28th day of March, 1878, the date of his certificate to its correctness. The motion for a new trial was denied on the 29th day of April, 1878, and on the 29th of May following a notice of appeal from the judgment entered on the 9th day of November, 1877, and from the order above mentioned denying the motion for a new trial, was given. The cause is now before this Court on the appeal of the 29th of May, 1878.

There is no error in the record before us. The Court below entered judgment as directed by the Supreme Court, and nothing has since occurred of which complaint is made.

The defendant, in his motion for a new trial, endeavors to bring under examination matters that occurred on the trial, which resulted in a judgment in his favor on the 20th day of August, 1875, and which judgment was reversed with directions as above stated. The Court below rendered judgment

for him on the findings. The Supreme Court reversed this judgment, and directed on the same findings a judgment for plaintiff.

It is contended on behalf of defendant that he is entitled to impeach the findings, as not sustained by the evidence on a motion for a new trial, and that he has been deprived of that right.

If he was not satisfied with the findings, he had the period prescribed by the Code of Civil Procedure (section 659) in which to give notice of his intention to move for a new trial. That period in this case was ten days after notice of the decision of the Court. It is evident that the time for such notice had passed long before the 19th of November, 1877, on which day the only notice of intention to move for such new trial was given. The defendant made his election to stand upon the findings, which did not sustain his judgment, and, having made such election, it cannot in any sense be said that he has been deprived of any right.

The judgment and order of the Court below are affirmed.

DEPARTMENT No. 1.

[Filed February 9, 1880.]

[No. 6115.]

DOUGLAS vs. FULDA ET AL.

APPEAL TOO LATE—SPECIFICATIONS—FINDING.

Appeal from the County Court, San Francisco.

The plaintiff appealed.

W. H. Allen and *John Wade*, for appellant.

W. C. Burnett, *G. F. & W. H. Sharp*, *Hunt & Rising*, for respondents.

By the Court, MCKINSTRY, J. (from the bench):

The judgment was both *rendered* and *entered* more than a year before the appeal was taken. The appeal from the judgment, therefore, must be dismissed.

The order denying a new trial must be affirmed. There are no specifications of the particulars in which the evidence was insufficient, and no error of law occurring at the trial was insisted on at the argument here.

At the hearing of the motion to re-tax costs, the facts were found by the Court below. After reading the affidavits filed by both parties, we are satisfied with that finding.

The transcript is subject to many of the objections referred to in deciding *Douglas* vs. *Fulda*, No. 6088.

Appeal from judgment dismissed, and orders affirmed.

Supreme Court of the United States.

OCTOBER TERM, 1879.

[No. 141.]

WILLIAM TRENOUTH, PLAINTIFF IN ERROR, vs. THE CITY AND COUNTY OF SAN FRANCISCO, JOHN H. BAIRD, ET AL.

1. The history of the title of San Francisco to her municipal lands stated.
2. The Act of Congress of March 8, 1866, "to quiet the title to certain lands within the corporate limits of the city of San Francisco," having confirmed the claim of the city, in trust that certain lands should be disposed of and conveyed to parties in the *bona fide* actual possession thereof, by themselves or tenants, on the passage of the act: *Held*, that parties who were at that time in possession of land as intruders and trespassers upon the prior possession of others, and who were afterwards, by legal proceedings, ejected from the premises, were not entitled to a conveyance from the city as beneficiaries under the act; but that the prior possessors who recovered the possession were such beneficiaries.
3. A pre-emption right, under the laws of the United States, cannot be acquired by intrusion and trespass upon lands in the actual possession of others; nor to lands in California, a claim to which under a foreign title was at the time pending before the tribunals of the United States for confirmation.

In error to the Supreme Court of the State of California.

Mr. Justice FIELD delivered the opinion of the Court:

This was a suit to charge the defendants as trustees of certain land in the city of San Francisco, and to compel a conveyance of the legal title to the plaintiff. The case is free from difficulty, but to understand the positions of the plaintiff it will be necessary to state briefly the history of the titles to lands in that city.

At the time of the conquest of California by the forces of the United States, on the 7th of July, 1846, there was a Mexican pueblo at the site of the present city of San Francisco. This term pueblo, in its original signification, means people or population, but is used in the sense of the English word town. It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement or village, as well as to a regularly organized municipality. (*Grisar* vs. *McDowell*, 6 Wall. 372.) The pueblo at San Francisco was a small settlement, but it was of sufficient importance, as early as 1835, to have an ayuntamiento, composed of alcaldes and other officers, and it was under their government for some

years. At the time of the conquest, and for some time afterwards, it was under the government of justices of the peace, or alcaldes.

By the laws of Mexico, in force in California on the acquisition of the country, pueblos or towns, when once recognized by public authority, became entitled, for their benefit and that of their inhabitants, to the use of the lands embracing the site of such pueblos or towns and adjoining territory within the limits of four square leagues, to be measured and assigned to them by the officers of the government. Under those laws the pueblo of San Francisco asserted a claim to four square leagues, to be measured off from the northern portion of the peninsula upon which the present city is situated.

The alcaldes of a pueblo exercised the power of distributing the lands of the town in small parcels to its inhabitants for building, cultivation, or other uses, the remainder being generally retained for commons or other public purposes.

When the town of San Francisco was occupied by our forces, citizens of the United States were appointed by the military or the naval commanders to act as alcaldes in the place of the Mexican officers. Upon the sudden increase of population at that place, following the discovery of gold, the alcaldes were called upon for building lots in great numbers; and those officers distributed them with the generous liberality usually attending the grant of other people's property. Numerous persons, however, arriving at the town were not disposed to recognize the authority in this respect of the American magistrates; and finding it less troublesome to appropriate what land they needed than to apply to the magistrates for it, they asserted that the land on which the pueblo was situated belonged to the United States, and, as evidence of the sincerity of their convictions, immediately proceeded to take as much of it for themselves as they could conveniently inclose and hold. Thus the town, was soon filled with an active and restless population, making large and expensive improvements upon lands, held in some instances under grants from the alcaldes, and in others by the right of prior possession. Sometimes the same parcel was claimed by different parties; by one party as a settler, and by another as the holder of an alcalde grant. Disputes both in and out of the courts, the natural consequence of this difference in the origin of the titles of the claimants, were greatly increased in bitterness by the enormous value which in a short period the lands acquired.

In April, 1850, soon after the organization of the State

government, San Francisco was incorporated as a city by the Legislature. She at once made claim to the lands of the pueblo as its successor, and when the Board of Land Commissioners was created, under the Act of Congress of March 3, 1851, she presented the claim for confirmation. In December, 1854, the board confirmed the claim for only a portion of the four square leagues. Dissatisfied with the limitation of the claim, the city appealed from the decree of the commissioners to the District Court of the United States. The Government also appealed, though subsequently it withdrew its appeal. The case remained in the District Court undetermined until September, 1864, a period of nearly ten years, when, under the authority of an act of Congress, that Court transferred the case to the Circuit Court, where it was decided in the following October. The decree, finally settled and entered May 18, 1865, confirmed the claim to a tract of land embracing so much of the upper portion of the peninsula upon which the city is situated, above the ordinary high-water mark of 1846, as would contain an area of four square leagues, the tract being bounded on the north and east by the Bay of San Francisco, on the west by the Pacific Ocean, and on the south by a due east and west line, drawn so as to include the area designated, subject to certain deductions which it is unnecessary to mention here. The lands were confirmed to San Francisco, in trust for the benefit of lot-holders under grants from the pueblo, town, or city, or other competent authority; and as to any residue, in trust for the use and benefit of the inhabitants of the city. As already stated, the city was incorporated in April, 1850. The charter she then received was repealed, and a new charter granted in April, 1851. The limits of the city, as defined by this latter charter, embraced an area of over two miles square. The lands lying outside of these charter limits are designated in the subsequent legislation of the city and State, and frequently in the decisions of the courts, as outside lands.

Pending the appeal of the pueblo claim in the District Court, the city passed an ordinance, known in its history, from the name of its author, as the Van Ness ordinance, the object of which was to settle and quiet the title of persons holding land in the city. It relinquished and granted all the right and claim of the city to land within the corporate limits, as defined by the charter of 1851, with certain exceptions, to parties in the actual possession thereof, by themselves or tenants, on or before the 1st of January, 1855; provided such possession was continued up to the time of the introduction of the ordinance into the common council, or if interrupted

by an intruder or trespasser, had been or might be recovered by legal process. And it declared that, for all the purposes contemplated by the ordinance, persons should be deemed possessors who held titles to lands within those limits by virtue of a grant made by any ayuntamiento, town council, alcalde, or justice of the peace of the former pueblo, before the 7th of July, 1846, or by virtue of a grant subsequently made by those authorities, within certain limits of the city previous to its incorporation by the State; provided the grant, or a material portion of it, had been recorded in a proper book of records in the control of the Recorder of the county previous to April 3, 1851. In March, 1858, the Legislature ratified and confirmed this ordinance, and on the 1st of July, 1864, Congress relinquished and granted to the city all the interest of the United States to the lands within the corporate limits of 1851, in trust for the uses and purposes of the ordinance. Thus the contention of the different claimants to land within those limits was settled, their titles secured, and the usual result of quieting titles—progress and prosperity—followed.

But appeals were prosecuted to the Supreme Court both by the United States and by the city; by the United States from the whole decree, and by the city from so much of it as included the reservations in the estimate of the quantity of land confirmed. While these appeals were pending, and on the 8th of March, 1866, Congress passed an act to quiet the title to certain lands within the corporate limits of the city. At this time the limits had been extended so as to be coincident with those of the county, and embraced the whole of the four square leagues confirmed. By this act all the right and title of the United States to the land covered by the decree of the Circuit Court were relinquished and granted to the city, and the claim to the land was confirmed—subject, however, to certain reservations and exceptions, and upon trust that all the land not previously granted to the city should be disposed of and conveyed by the city to the parties in the *bona fide actual possession thereof, by themselves or tenants, on the passage of the act*, in such quantities, and upon such terms and conditions, as the Legislature of the State of California might prescribe, except such parcels thereof as might be reserved and set apart by ordinance of the city for public uses. The appeals to the Supreme Court were accordingly dismissed. (*Townsend* vs. *Greeley*, 5 Wall. 337.) The title of the city to the land within the four square leagues rests, therefore, upon the decree of the Circuit Court, as entered on the 18th of May, 1865, and this confirmatory act

of Congress. By this act the Government expressed its will with respect to the claim of the city, and the conditions upon which it should be recognized and confirmed. As was said by this Court, in *Grisar* vs. *McDowell*, "in the execution of its treaty obligations with respect to property claimed under Mexican laws, the Government may adopt such modes of procedure as it may deem expedient. It may act by legislation directly upon the claims preferred, or it may provide a special board for their determination, or it may require their submission to the ordinary tribunals. It is the sole judge of the propriety of the mode; and having the plenary power of confirmation, it may annex any conditions to the confirmation of a claim, resting upon an imperfect right, which it may choose. It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts; and it may arrest the action of board or courts at any stage." (6 Wall. 379.)

The title of the city being thus settled, its authorities proceeded under the provisions of the Confirmatory Act, and reserved and set apart groun'ls for parks and other public purposes. But as these grounds were, in many instances, occupied, the city passed an ordinance known as No. 800, subsequently ratified by the Legislature, by which a general assessment was levied upon all the lands conveyed to occupants as a condition of receiving deeds from the city, the money thus raised to be applied towards compensating those whose lands were thus taken for public purposes.

Some of the defendants, and parties through whom the others claim, had been in the actual possession of the land in controversy here before the passage of the Act of 1866, but their possession had been intruded upon by violence, and they driven from the land by parties through whom the plaintiff claims. One of the intruding parties afterwards set up a claim that he entered as a pre-emptioner under the laws of the United States. Subsequently the excluded parties recovered possession by suit, and the judgment in their favor was affirmed on appeal by the Supreme Court of the State. They then transferred the property, for the sake of convenience and expedition in securing the title, to one of their number, who applied to the city authorities and obtained a deed of the premises, first paying the assessment levied upon it and the taxes due. Under this deed the defendants hold the property. The plaintiff, representing the claims of the intruding and subsequently ejected parties, and insisting that they were beneficiaries under the act of Congress, be-

cause upon its passage they were in the actual possession of the property, brought the present suit to charge the defendants as trustees of the legal title for his benefit. The District Court and the Supreme Court of the State were of opinion that, upon his own showing, his grantors (the intruders mentioned) were never in the *bona fide* possession of the property, within the meaning of the act of Congress; and we agree with them in this respect. The claim of one of the intruders as a pre-emptioner was equally unfounded: First, because the right of pre-emption, under the laws of the United States, cannot be acquired by intrusion and trespass upon lands in the actual possession of others; second, because the lands were claimed under a foreign title, that of the pueblo from Mexico, the claim to which was then pending before the tribunals of the United States.

The possession obtained by the intrusion and trespass of the plaintiff's grantors constitutes no ground for equitable relief against the holders of the city title; and the assertion of a possession thus obtained has as little merit as the lawless and unjustifiable conduct of the intruders in seizing the property.

Judgment affirmed.

Abstract of Recent Decisions.

OREGON.

U. S. CIRCUIT COURT—DEADY, J.

DECISIONS OF THE LAND OFFICE. The action of the Land Office upon questions of fact arising in the course of its business is conclusive upon other tribunals, unless it appears that such action is the result of fraud or mistake other than an error of judgment in estimating the value of evidence, or making deductions therefrom; but for error in the construction or application of the law relating to such business, its decisions may be reviewed and modified, or annulled by the courts.—*Aiken* vs. *Ferry*, decided November 7, 1879.

RESIDENCE. The Pre-emption Act requires a pre-emptor to *inhabit* the tract claimed by him, and this means to abide there—to actually reside upon the premises until the final proof and payment is made.—*Id.*

RIGHT TO CONTEST. No one can be heard to question or contest the right of another to a patent for public land until he shows some right in himself in or to the premises.—*Id.*

PRE-EMPTION RIGHT. The right of pre-emption is not an

interest in the land, but the right to be preferred as a purchaser of a certain portion of the public domain; and it accrues when the settler has complied with the prerequisites of the act by making his settlement and filing his declaratory statement.—*Id.*

PRE-EMPTOR, QUALIFICATION OF. If a settler under the Pre-emption Act is a qualified pre-emptor *at the time* of filing his declaratory statement, he is entitled, as against the United States, to become the purchaser of the premises.—*Id.*

PROPRIETOR OF LAND. The term "proprietor," as used in the inhibition contained in section 10 of the Pre-emption Act (5 Stat. 455; § 2260 R. S.), means an absolute and legal owner; and therefore, where one owns land in trust for another, or has entered public land with cash or scrip, but has not received a patent therefor, he is not such a "proprietor" thereof, and is therefore not thereby disqualified to acquire the right of pre-emption.—*Id.*

PATENTEE WHEN A TRUSTEE. Upon an erroneous construction of the law relating to the qualification of a pre-emptor, the Land Office canceled the entry of A, and issued a patent to F, a junior settler, for a portion of the tract entered by A: *Held*, that F was a trustee for A as to such portion, and must convey the same to him on receiving the purchase price thereof.—*Id.*

STATUTE OF FRAUDS. A parol contract in relation to lands, if set out in the bill, is to have the same effect, as against the plaintiff, as if it had been made in writing.—*Id.*

LIMITATION. Cases of constructive trust being purely of equitable cognizance, lapse of time is no absolute bar to a suit for relief thereon; and when the trust arises out of the fraud of the defendant, or those under whom he claims, there is no fixed rule upon the subject, but each case is decided according to its own facts and circumstances.—*Stevens* vs. *Sharp*, decided November 21, 1879.

LOCAL STATUTE OF LIMITATIONS. A State statute of limitation is not applicable in the national courts in a suit in equity; but, under ordinary circumstances, the limitations prescribed therein will be regarded as reasonable.—*Id.*

PATENT—MISTAKE. A married settler under the Donation Act fraudulently procured a certificate and patent to the wife's share of the donation, to be issued to a woman not his wife: *Held*, that a court of equity had jurisdiction to correct the error, by requiring the patentee, or her assigns, to to convey the premises to the wife, or her assigns.—*Id.*

TOWN SITE. The occupation of a tract of land as a town site for the purposes of business or trade, which is after-

wards abandoned, does not impress upon the locality the character or quality of a town site, so that the same cannot be taken up and held under the Donation Act as unoccupied public land.—*Bear* vs. *Luce*, decided December 10, 1879.

SUIT TO AFFECT A PATENT. Equity does not have jurisdiction to affect a patent, except upon the ground of an antecedent equity in the plaintiff, which was disregarded in the issuing thereof; and therefore a party who claims to have settled upon a tract of public land subsequent to the settlement and entry thereof by another, who has received the patent for the same, upon the ground that the settlement and entry of the patentee were illegal and void, cannot maintain a suit to set aside such patent, or charge the patentee as his trustee of the premises.—*Id.*

QUESTIONS OF FACT—DECISIONS OF THE LAND DEPARTMENT. Questions of fact decided in the Land Department are not subject to review by the courts except for fraud, or mistake other than an error of judgment; and where there is a contest in such department between one who claims to be a settler upon a portion of the public land to cancel the entry of a prior settler upon the same land, the decision therein precludes further inquiry by the parties into any question of fact which might properly have been made in such contest, the same as if it had been actually so made and considered. —*Id.*

IDEM—QUESTION OF LAW. Whether a settler under the Donation Act upon unsurveyed lands could commute his residence thereon, under sections 1 of the Act of February 14, 1853, and July 17, 1854, by the payment of $1.25 an acre therefor, is a question of law; and therefore the decision of the Land Department thereon may be reviewed by this Court, upon the suit of a party having an equity in the premises prior to such entry, but not otherwise, except in a suit by the United States to cancel the patent issued upon such entry. —*Id.*

GRANT TO MISSIONS IN OREGON. The grant to religious societies of mission stations in Oregon, contained in section 1 of the Act of August 14, 1848 (9 Stat. 323), is not confined to a single station to each society, but includes as many stations as were then actually occupied by each society for missionary purposes among the Indians.—*Dalles City* vs. *Missionary Society*, decided December 3, 1879.

PATENT—SURVEY. A patent issued under section 2447 of the Revised Statutes, upon a survey not approved by the Surveyor-General, is void; and in case of a grant under section 1 of the Act of August 14, 1848, the survey to be ap-

proved by the Surveyor-General necessarily involves the determination of the question, What is the quantity and boundary of the claim?—*Id.*

MISSION STATION. The grant to religious societies, contained in the act aforesaid, of the missionary stations *occupied* by them in Oregon on August 14, 1848, not exceeding 640 acres, is not confined to the land actually inclosed and cultivated by them, but should be construed to include the maximum quantity at each station occupied by them—that is, *claimed* and *in any way used* by them, and not in the actual occupation of any one else.—*Id.*

OCCUPATION OF MISSION STATION. Occupancy is a word of narrower signification than possession, and means to possess by laying hold of, or being actually upon, the thing possessed, continuously and exclusively. Prior to August 14, 1848, the title to all lands in Oregon was in the United States, and therefore no person could have constructive possession of any portion thereof, or any possession thereof or interest therein, except actual possession or occupancy; and when this was given up or abandoned, the relation of the party to the land was absolutely terminated.—*Id.*

MISSION STATION AT THE DALLES. The Missionary Society of the M. E. Church established a mission among the Indians at Wascopam, near the Grand Dalles of the Columbia, in 1838, and in September, 1847, abandoned and transferred the same to Dr. Whitman, of the Presbyterian Mission at Wailatpû, and never reoccupied the same: *Held*, that the society did not receive a grant of said station under section 1 of the Act of October 14, 1848, because it was not at that date in the actual possession and occupation of the premises—that such occupation was a condition precedent to the taking effect of such grant, and therefore it mattered not whether the failure of the society to occupy the station in August, 1848, was voluntary, or was caused by the fear of hostile Indians.—*Id.*

PAYMENT BY CONGRESS. The payment by Congress to the missionary society of $20,000, in June, 1860, on account of the reservation of 353 acres of the Dalles Mission Station in March, 1850, for military purposes, and the loss or destruction of property thereon since 1847, by Oregon volunteers, Indians, or United States troops, did not have the effect to invest the society with the title to such station then, or on August 14, 1848; nor was it even an admission that the society had any legal right to the premises, but only that it asserted some kind of a claim thereto, which it was deemed expedient to extinguish. Nor could Congress, in June, 1860,

by a direct recognition of a prior grant to the society, affect the rights of others already acquired in the premises under the Town Site and Donation Acts.—*Id.*

CONDITIONS IN BOND. Where an officer is required by his superior, *colore officii*, to give a bond with stipulations or provisions in the condition thereof not required by statute, the bond is void *in toto*.—*The United States* vs. *Humason*, decided December 15, 1879.

PUBLIC MONEY. The parties to an official bond for the safe keeping or accounting for public money are not liable for the loss of the same when such loss is caused by the act of God or the public enemy.—*Id.*

CONDITION. The performance of an express contract is not excused by reason of anything accruing after the contract; but in the case of a condition in a bond to do a thing, performance is excused when prevented by the law or an overruling necessity.—*Id.*

ENDORSERS, DISCHARGE OF. When the holder of a negotiable instrument makes an early blank endorsement payable to himself, he does not thereby discharge subsequent endorsers from their liability as such.—*Bank of British North America* vs. *Ellis*, decided January 26, 1880.

ATTORNEY FEE. A stipulation by the maker of a negotiable instrument for the payment to the holder thereof of an attorney fee, in case the same is not paid without action, is a valid promise, and passes with the instrument to each and every holder thereof; and each subsequent party to such instrument becomes thereby responsible, in like manner, for such fee to each and every subsequent holder thereof.—*Id.*

ATTEMPT TO COMMIT MURDER.—There is no law of the the United States for the punishment of the crime of an attempt to commit murder upon land in places within the exclusive jurisdiction thereof, unless committed by some means other than an assault with a dangerous weapon, as by poison, drowning, or the like.—*United States* vs. *Williams*, decided February 5, 1880.

DANGEROUS WEAPON. A dangerous weapon is one likely to produce death, or great bodily harm; and a loaded pistol is such a weapon within the knowledge of the court.—*Id.*

IDEM. When it is practicable for the court to declare a particular weapon a dangerous one or not, it is the duty of the court to do so; but otherwise it is a question of law and fact, to be determined by the jury under the direction of the court.—*Id.*

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Current Topics.

THE Supreme Court of this State has delivered opinions in ninety-four cases since the beginning of the year. The judges are making rapid progress in clearing the calendar, and before many months will doubtless be even with their work. Then if the time for appealing can be reduced from one year to six months or three months, and if other methods of delay can be checked, we shall soon be in the happy enjoyment of that rare state where men do not have cause to complain of the "law's delay." It may be possible eventually to have an ordinary case commenced, tried, appealed, and finally disposed of, within a single year. Such should be the general rule.

THE index for Volume IV of the JOURNAL will be ready this week. We will then be ready to fill orders for binding as fast as they come in. The cost of binding will be one dollar per volume if delivered at the office, and one dollar and twenty-five cents if delivered by mail.

THE Superior Courts of San Francisco are progressing rapidly with the trial of causes. Over eighty cases are called each day, and nearly half are decided.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed February 28, 1880.]

[No. 6018.]

HOOPER vs. FLOOD.

MECHANICS' LIENS—PRINCIPAL AND AGENT—MEANING OF THE WORD "CASH"—NAME OF THE REPUTED OWNER—SUFFICIENT STATEMENT.

Appeal from the Twenty-second Court of Sonoma County.

A. Thomas, for appellant.

H. H. Haight, for respondent.

By the Court, SHARPSTEIN, J.:

This is an action for the foreclosure of five mechanics' liens. Four of the persons claiming liens united in the action as original plaintiffs, and one of them was permitted to come in as an intervenor. Each of the original plaintiffs stated his cause of action in an independent count. To that we cannot perceive any serious objection.

The action is brought against Alexander Flood and James Irvine, and in the complaint it is alleged that Irvine is the owner of the premises affected by the liens, "and that the defendant Alexander Flood was employed by said defendant James Irvine, the owner as aforesaid, as his agent for and in the said construction and erection of said buildings." Afterwards it is alleged that the plaintiffs entered into an agreement "with said defendant Alexander Flood, as such agent of said defendant James Irvine, for the delivery" of the materials "used in the erection of said buildings." This complaint was demurred to on the ground, among others, of misjoinder of parties defendant, because said Flood was not a proper or necessary party defendant in the action. The demurrer was overruled.

Assuming, as we must, that the relations which the several parties sustained toward each other are correctly stated in the complaint, we cannot avoid the conclusion that Flood was neither a necessary or proper party to the action. He is alleged to have been the agent of Irvine—a fact which, we are bound to presume from the allegations of the complaint, was well known to the plaintiffs when dealing with him. Upon what principle an agent who contracts for his principal can be held liable, either in connection with his principal or otherwise, passes our comprehension. By this we mean an

agent who is such in fact, and who really and ostensibly acts within the scope of his authority for his principal, as Flood did according to the allegations of the complaint. If it were alleged that Flood was the "contractor, sub-contractor, architect, builder, or other person" who had charge of the construction of defendant Irvine's buildings, we should be bound to hold Flood to be the agent of Irvine for the purposes of chapter 2, title 4, of the Code of Civil Procedure. The complaint, however, contains allegations which establish the relation of principal and agent between Irvine and Flood independently of that provision; and that provision does not make the persons who are to be held agents for the purposes therein specified, liable on contracts negotiated by them for their principals beyond what they otherwise would be. As a contractor or sub-contractor, Flood might be a proper party to the action. As a simple agent, he is not. The demurrer to the complaint on the ground above specified should have been sustained.

After the demurrer was overruled, the defendant Irvine answered the complaint, and alleged that Flood was a contractor; and the Court found such to be the fact. But that does not cure the error which the Court committed by overruling the demurrer.

The defendant annexes to, and makes a part of his answer, copies of the claims of liens filed for record by the several plaintiffs in this action. Each of these statements contain the following clauses:

"That said materials were furnished to Alexander Flood for and as the agent of the said James Irvine."

"That the terms, time given, and conditions of said contract are and were cash."

The law requires that the statement filed for record shall contain "the name of the owner or reputed owner, if known, and also the name of the person by whom he (claimant) was employed, or to whom he (claimant) furnished the materials, with a statement of the terms, time given, and conditions of his contract." (C. C. P., sec. 1187.)

On behalf of appellant it is insisted that the requirement as to "terms, time given, and conditions of his contract" is not fulfilled by the statement that they "were and are cash." "The lien provided by the statute can be maintained only by a substantial observance of its provisions." (*Wood* vs. *Wrede*, 46 Cal. 637.) And we are not at liberty to treat any of its requirements as unessential. The only question which we can determine is, whether there has been a substantial compliance with them. Whether the word "cash" sufficiently

shows what the terms and conditions of the contract were, and what time was given, is the question which we have to decide.

In respondent's brief it is said that "In modern times there is no word in the English language so pregnant with meaning as the little word 'cash,' used in the proper relation;" and it is further said, in the same connection, that "it contains a word of significance." On turning, however, to the standard dictionaries of the English language, we find that its primary meaning is "a box," and that its common meaning is "money," and that it sometimes means "ready money." Accepting these definitions as probably correct, it does not seem to us that the word "cash," when used in the connection in which it is in this case, signifies anything.

Assuming that the contract in this case was of the most simple character, consisting of an agreement that one of the parties should furnish certain materials to be used in the construction of the buildings which were being erected upon the defendants' premises, and that the other should pay a stipulated price for said materials upon the delivery of them upon said premises or elsewhere, would the word "cash" indicate to a reasonable certainty that these were "the terms, time given, and conditions" of the contract? If a witness were asked to state before a court and jury "the terms, time given, and conditions" of such a contract, would the answer "cash" be considered satisfactory? It is conceded that if time had been given, "cash" would not be the appropriate word to express the "terms, time given, and conditions" of the contract. In that case the word "credit" would throw just as much light upon the terms, etc., of the contract, as the word "cash" does in this case. To hold that the statement in this case, in respect of "the terms, time given, and conditions of his contract," is a compliance with the law, would be, in effect, to hold that a compliance with it in this respect is unnecessary. This we are not prepared to do.

The complaint of the intervenor was not demurred to, and the only objection which we can consider in his case is one which arises out of the finding of the Court. The Court embodies in its tenth finding a copy of the intervenor's notice and claim of lien filed for record. In that copy the name of the owner or reputed owner of the property is not given, nor is it stated that the name of such owner or reputed owner of the property is not known to the persons who filed the statement. The law required that "a claim containing a statement" of certain facts, "with the name of the owner or reputed owner, if known," should be filed for record. (C. C. P.,

sec. 1187.) But the statement is in substance that James Irvine caused the buildings to be constructed; that the materials were furnished for him to be and were used in the construction of said buildings; and that it is the intention of the claimants to claim and hold a lien upon the buildings and the land upon which they are erected, and upon such interest as James Irvine, who caused the buildings to be constructed, had therein and thereto on the 20th day of September, 1875, when the claimants commenced furnishing said materials.

Is that equivalent to a statement of the name of the owner or reputed owner of the property, or that the name of such owner or reputed owner is not known? We cannot so hold. Everything stated may be strictly true, and yet Irvine be neither the owner or reputed owner of the premises upon which the buildings were erected. That it subsequently appeared in the case that he was the owner cannot cure this defect in the claim filed for record. Upon a compliance with the law, and upon no other condition, is a lien given.

It follows that the judgment in this case must be reversed.

Judgment reversed.

DEPARTMENT No. 2.

[Filed February 27, 1880.]

[No. 6092.]

WILKIE vs. COHN.

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT. The affidavit for attachment must state positively that the debt is not secured by any mortgage or lien; or if it has been so secured, and the security has become valueless without any act of the plaintiff, it must state that fact positively. Stating both facts in the alternative is a statement of neither, and renders the affidavit insufficient.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

J. Naphtaly, for appellant.

Lloyd & Newlands, for respondents.

By the Court, MYRICK, J.:

This is an appeal from an order dissolving an attachment.

The affidavit for attachment was in the form required by the statute as to statement of the indebtedness upon a contract made in this State, and concluded with these words: "And that the payment of the same has not been secured by any

mortgage or lien upon real or personal property, or any pledge upon personal property; or, if originally so secured, that such security has, without any act of the plaintiff or the person to whom the security was given, become valueless." Upon this affidavit the defendant moved to dissolve the attachment, which motion was granted.

The objection to the sufficiency of the affidavit is made, that whereas the statute gives a creditor a right to have his debtor's property seized to respond to a judgment in either one of two instances—viz., where there has been no security, or, there having been security, such security has without any act of the creditor become valueless—this affidavit, stating both in the alternative, in fact states neither.

It has been held in several States, and is repeated in Drake on Attachments, sec. 102, "that where the disjunctive *or* is used, not to connect two distinct facts of different natures, but to characterize and include two or more phases of the same fact attended with the same results, the construction that it was uncertain which state of facts existed was inapplicable. For instance, where the statute authorized an attachment when the defendant absconds or secretes himself, it was considered that, from the difficulty of determining which was the fact, the disjunctive *or* did not render the affidavit uncertain." Absconding is one thing, secreting is another; yet the creditor may not always be able to ascertain which exists; persons absconding or secreting themselves do not usually publish their doings. But, in regard to security, a creditor knows, or ought to know, whether there has been security given. If security has been given, he knows, or ought to know, whether the security has been rendered valueless without his act. If he have something in his hand as security which was once of value, he can certainly tell whether or not any security was ever given. If the security has become valueless, no man knows better than he whether his act contributed thereto. It would be proper to follow the language of the statute in saying that payment had not been secured by any mortgage or lien upon real or personal property, or any pledge upon personal property, because it includes two or more phases of the same fact attended with the same results—namely, that no security had ever been given; but to use the above language, and then say, "*or*, if originally so secured, such security has become valueless," is not to state either with certainty. It is not to say that no security was ever given, neither is it to say that security was given, but that the same has become valueless. We are not directed to any decision of this Court upon the point directly

before us; but there are cases involving parallel principles. Thus in *Hawley* vs. *Delmas*, 4 Cal. 195, where the affidavit stated the indebtedness to be "upon a contract expressed *or* implied," it was held insufficient.

In the case at bar it was urged that the ultimate point to be reached is that no security exists *now*. As well might it have been urged in *Hawley* vs. *Delmas* that the existense of a *contract* was the ultimate point. So in *Bostford* vs. *Howell*, 52 Cal. 158, a party applying to purchase land under section 3443 of the Political Code, stated, in the exact words of the statute, that he did "not know of any valid claim to the same other than his own, and that there were no settlers thereon, *or*, if there were, that the land had been segregated more than six months," it was held that the application did not conform to the statute; that the facts must be stated directly and positively, and not in an alternative form.

It was urged on the argument that a creditor might have had frequent transactions with his debtor, and may not always be able to determine whether or not the particular debt is included in the list of secured debts. We can only say that if creditors wish to be within the statute giving the provisional remedy by attachment, they must so keep knowledge of their affairs as that they can state the facts. If a creditor has never had security, it is very easy to say so; if he once had security, and the security has become valueless without his act, it is as easy to say so.

Order affirmed.

DEPARTMENT NO. 2.

[Filed March 1, 1880.]

[No. 6128.]

GOLDTREE vs. FUNKENSTEIN.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Douthitt & McGraw, for appellants.
Hunt & Rising, for respondents.

BY THE COURT:

On the authority of *Hoff* vs. *Funkenstein* (No 6097), and for the reasons given in the opinion filed therein, judgment reversed and cause remanded, with instructions to overrule the demurrer, and with leave to defendants to answer.

DEPARTMENT NO. 2.

[Filed March 1, 1880.]

[No. 10,487.]

IN THE MATTER OF THE APPLICATION OF AB ELLIS TO BE DISCHARGED ON HABEAS CORPUS.

JUSTICE OF PEACE—JUDGMENT OF IMPRISONMENT. A judgment by a justice of the peace that a defendant be fined $300, and in default of the payment of the fine that he be committed not exceeding 300 days, substantially conforms to the statute. (Penal Code, § 1205.)

Original application for habeas corpus.

J. H. Budd, for the application *contra*.

By the Court, MCKINSTRY, *J.*:

The judgment of the justice of the peace, as appears by the transcript from his minutes, is in the following words: "Defendant brought into Court at his special instance and request, and plead guilty as charged in the complaint, and having waived the legal time for sentence, whereupon the Court doth order and adjudge that the defendant be fined in the sum of three hundred dollars ($300), and *in default of the payment of said fine* that said defendant be and is hereby committed to the Sheriff of Fresno County, and by said Sheriff imprisoned in the County Jail of said county not exceeding three hundred days."

Section 1205 of the Penal Code reads: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, specifying the extent of the imprisonment, which must not exceed one day for every dollar of the fine."

The Court does not adjudge that the defendant has failed to pay the fine, and thereupon direct that he be imprisoned three hundred days; and it is perfectly manifest that when the judgment was being pronounced the Court could not have known that the fine would not be paid. The language imports that he shall be imprisoned "not exceeding" three hundred days in case he shall not pay the fine. Considered in their relation to the context, the words that he be imprisoned "in default of the payment of said fine" are the equivalent of those found in the section of the Penal Code "that he be imprisoned until the fine be satisfied." In Georgia the form required by the law was that the defendant should stand committed until the fine be paid. The Supreme Court of that State held *good* a judgment that defendant pay

a certain fine, and on failure to pay the same that he be committed to jail for three months, unless sooner paid. (*Brink* vs. *The State*, 22 Ga. 98.)

We think also the direction that he be imprisoned in default of payment of the fine, or, in other words, that he be imprisoned in case the fine be not satisfied, "not exceeding three hundred days," is a compliance with the portion of the same section which requires a specification of the extent of the imprisonment "not to exceed" a certain limit. Since the imprisonment may on any day be brought to an end by payment of the fine, it is manifest that the statute can only mean that the *maximum* shall be specified or named with certainty. We reach the conclusion, therefore, that however inartificially drawn, the judgment of the justice accords with the statute.

The last clause of section 1205 is a direction to, and limitation upon the power of, the Court pronouncing the judgment. The judge has been informed in the preceding clauses that he may fine and may imprison until the fine be satisfied, provided he specifies the term of imprisonment. The last clause instructs him that, in fixing the period of imprisonment, he must name a period of time which bears a certain relation to the amount of the fine. Section 1205 does not demand that the judgment shall *state* that the imprisonment therein mentioned "must not exceed one day for every dollar of the fine," and such statement would add no force to those which preceded it, since whether the imprisonment did or not conform to the *ratio* would appear on inspection of the judgment —such statement being omitted. Nor does the section require that the judgment shall recite that defendant will be entitled to his discharge on payment of the fine, although his right to a discharge would doubtless be a legal consequence of the payment. Section 1456 provides: "When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody *during the time specified in the judgment*, unless the fine is sooner paid."

Whether, under the sections of the Code referred to or other provisions of statutes, the petitioner will be entitled to his discharge at any time prior to the expiration of the three hundred days upon payment of the fine imposed by the judgment, *less* a number of dollars equal to the number of days imprisonment he shall already have suffered, is a question which may depend upon the proper construction of the Code or other statutes. It was held in *Ex parte Kelly*, 28 Cal. 414, that, by virtue of the second section of "An act concerning

persons under sentence of imprisonment" (Stats. 1857, p. 151), a person in prison under an alternate sentence of fine or imprisonment was entitled to a credit of two dollars for each day he had remained in prison, and could at any time pay the sum remaining unsatisfied and claim his discharge. But, as here suggested, the question is purely hypothetical; it does not appear that any part of the fine has been paid or tendered."

The only question we have been called on to decide is whether the judgment of the justice of the peace substantially conforms to the statute.

The prisoner must be remanded to the custody of the Sheriff.

So ordered.

DEPARTMENT No. 2.

[Filed February 21, 1880.]

[No. 5931.]

L. C. KELLY vs. WM. McKIBBEN.

AN AMENDED COMPLAINT, upon being filed, takes the place of the original complaint, which then ceases to be the complaint in the case.

IN REPLEVIN, where the plaintiff is entitled to recover, he is entitled to damages for the detention of the property, but not for money expended in endeavoring to regain it.

THE MEMORANDUM OF COSTS is no part of the judgment roll, and an order denying a motion to retax costs will not be reviewed upon an appeal from the judgment.

Appeal from the District Court of the Fourth Judicial District, San Francisco.

Replevin for household furniture. Defendant appealed from the judgment and from an order refusing to retax costs.

Meighan & Sullivan, for appellant.

Daniel T. Sullivan, for respondent.

BY THE COURT:

The judgment in this case can be so modified as to make it conform to the requirements of section 667 of the Code of Civil Procedure. To accomplish this, no other guide than the plain provisions of that section and the findings on file will be necessary.

The mode of describing the property recovered in the judgment is not one that we can conscientiously recommend as a precedent. But the description is not uncertain. *Certum est quod certum reddi potest.* The reference in the judgment to the finding, and in the finding to the complaint, for a de-

scription of the property is inexcusably circuitous, but not ambiguous. There is but one complaint in the action. When the amended complaint was filed, the original ceased to be the complaint in the case. It was superseded by the amended complaint. (*Barber* vs. *Reynolds*, 33 Cal. 497.) The reference, therefore, is unmistakably to the amended complaint. We do not think that any intelligent person will experience any insurmountable difficulty in segregating the articles enumerated in the first finding from those specified in the complaint.

The fourth finding is clearly erroneous. The plaintiff was entitled to damages for the detention of the property, and not for the money by him expended in the pursuit of and endeavoring to regain it. It was error to include in the judgment the sum of $150 so found to have been expended.

Interest is allowed in the judgment upon the value of the property from the time it was taken from the possession of the plaintiff by the defendant. As no other damages for the detention are found or included in the judgment, we think that such interest may be regarded as damages for said detention. (*Freeborn* vs. *Nocross*, 49 Cal. 313.)

This appeal is from the judgment; and as we have only the judgment roll before us, we cannot review the order denying the motion to retax costs. The memorandum of costs constitutes no part of the judgment roll.

Cause remanded to the Superior Court of the city and county of San Francisco, with directions to modify the judgment so that the plaintiff recover $775.80, with legal interest thereon from the date of the judgment; and that said judgment in other respects be made to conform to the views herein expressed.

DEPARTMENT No. 1.

[Filed February 20, 1880.]

[No. 6054.]

BRADY vs. KELLY.

STREET ASSESSMENT.

By the Court, MCKINSTRY, J. (from the bench):

The judgment is affirmed, for the reason that the questions now presented were finally determined by this Court upon the former appeal. (52 Cal. 371.)

So ordered.

DEPARTMENT No. 1.

[Filed March 1, 1880.]

[No. 6979.]

THE PEOPLE vs. CENTER ET AL.

PRACTICE AFTER APPEAL. After an appeal to the Supreme Court has been taken and completed, the action is removed from the Court below, except as to matters not affected by the appeal, and that Court has no longer any power or control over the action.

SAME—CLERK OF SUPERIOR COURT. For all purposes connected with its appellate jurisdiction, the Supreme Court has the same power over the Clerk of the Court below as it has over its own Clerk.

DUTY OF CLERK. It is the duty of a clerk of a court to certify to the correctness of documents in the transcript, but he cannot determine what constitutes a transcript.

Appeal from the District Court of the Twelfth Judicial District, of the city and county of San Francisco.

J. B. Townsend, for appellant.

Attorney-General, for respondent.

By the Court, McKEE, J.:

Counsel for respondent has argued the application in this case as though it was an action of mandamus; but it is not, and therefore the authorities to which he refers are inapplicable.

The application is a motion for an order on the County Clerk of the city and county of San Francisco to compel him, upon payment of his lawful fees, to certify to the correctness of the several documents contained in a printed transcript presented to him for his signature, as a transcript on appeal in this case.

It is objected, by way of answer to the affidavit on which the motion is made, that the so-called transcript is not correct; that it does not conform to sections 950, 951, and 952 of the Code of Civil Procedure; and that the Judge of the Superior Court, from whose judgment the appeal in this case has been taken, has made an order forbidding the Clerk to certify to the correctness of the transcript.

But the order of the Superior Judge is void, because it was made in the action after an appeal had been taken from his judgment and orders, and while the same was pending in this Court on appeal, and because a court from which an appeal has been taken is not authorized to say what papers shall be used on appeal to this Court. (*Buckman* vs. *Whitney*, 28 Cal. 555.) That is a matter regulated by the Civil Code of Procedure. After an appeal to this Court is complete, the

action is removed from the Court below, except as to matters not affected by the appeal, and that Court has no longer any power or control over the action. (*Baggs* vs. *Smith*, 53 Cal. 88.) For all purposes connected with its appellate jurisdiction, this Court has the same power over the clerk of the court below as it has over its own clerk; and it may, on a proper application, by order require the clerk of the court below to perform any duty which is necessary to a complete exercise of its jurisdiction in the cause.

By section 128 of the Code of Civil Procedure, every court has power to control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. Upon that idea this Court has, by its rules, regulated the action of clerks of inferior courts in making up and transmitting transcripts to it in cases in which appeals may be taken. (Rules 4, 12, 36.)

Whether the alleged documents, when certified, will constitute a transcript on appeal in this case is a question which a clerk of a court cannot determine. It is his duty to certify to the correctness of the documents in the transcript, if they are correct copies of the originals in his custody, and transmit the same to this Court; and if erroneous or defective in any respect, that is a matter which the Court can hear and determine upon objections or exceptions which may be made to it.

Order granted.

DEPARTMENT NO. 2.

[Filed March 2, 1880.]

[No. 6989.]

McDONALD vs. PATTERSON.

CONSTRUCTION OF CONSTITUTION—STREET WORK. The language of section 19 of Article XI, relative to work in the improvement of streets within cities, is both mandatory and prohibitory in its character. It does not require legislation to enforce it, but its terms operate a repeal of the Street Law of April 1, 1872.

Mandamus to the Superintendent of Streets in San Francisco.

John L. Murphy, for respondent.

Shafter, Parker & Waterman, for petitioner.

By the Court, THORNTON, J.:

This is an application for a writ of mandate commanding the defendant, who is Superintendent of Streets, Highways,

and Squares for the city and county of San Francisco, to execute, in his official character, a contract for the construction of a brick sewer in the northerly and southerly half of the crossing of Van Ness Avenue and Pine Street, to connect in the centre of said crossing with the sewer at present therein, so as to form a full crossing.

It appears from the facts stated in the petition of McDonald (which are not denied) that on the 29th of December, 1879, the Board of Supervisors of the city and county of San Francisco adopted a resolution of intention to order the street work above designated, and that thereafter such proceedings were had that a contract for doing the work referred to was, on the 2d of February, 1880, regularly awarded to the petitioner; that he (the petitioner) entered into and signed such contract containing the terms required by law, and did all other things which he was bound to do in the premises; and on the 9th day of February, 1880, he presented the contract so signed by him with the proper bonds executed by himself and sureties, and requested the Superintendent (Patterson) to execute the contract on his part, which that officer refused to do on the ground that he was forbidden by section 19 of Article XI of the new Constitution from executing such contract.

The portion of the section of the Constitution referred to, which relates to this matter, is in these words:

"No public work or improvement of any description whatsoever shall be done or made in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment in proportion to benefits on the property to be affected or benefited shall be levied, collected, and paid into the City Treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

It is conceded that the cost and expense of the sewer to be constructed under the alleged contract is, by the terms of the statute under which this contract was awarded, chargeable and must be assessed upon private property by special assessment. Of this meaning of the statute we entertain no doubt.

It is contended before us that the street law, Act of April 1, 1874 (see statutes, 1871–2, p. 804), is continued in force by the first section of Article XXII of the Constitution, inasmuch as it is only inconsistent with provisions of the Con-

stitution, which require legislation to enforce them, that the act referred to is a system for the improvement of the streets, and the intention manifested by the section of the Constitution referred to is that the system under this act of the Legislature shall be operative until the Legislature shall adopt another system under the Constitution, observing in such system the prohibition of the 19th section of Article XI that, should the Legislature, however, fail to adopt such new system, the former one ceases to be of force on the 1st day of July, 1880.

This view is very ingeniously urged in the brief of the learned attorney of the city and county furnished since the oral argument, and has been very fully considered by the Court.

The section of Article XXII, referred to, declares that all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature, and that the provisions of all laws which are inconsistent with it shall cease upon the adoption thereof, except as to such laws which are inconsistent with the provisions of the Constitution which require legislation to enforce them. This latter class of laws remain in force until the 1st of July, 1880, unless sooner altered by the Legislature.

In the construction of this Constitution the rule expressed in section 22 of Article I must always be regarded. That section declares that the "provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Now, in the light of this rule laid down in words so clear and terms so imperative, we will examine the sections above referred to.

The language of section 19 of Article XI is both mandatory and prohibitory in its character. It is clear and unambiguous. It is difficult to see that it could have been made stronger in its words of command and prohibition. What words more vigorous or more appropriate to their manifest purpose could have been found in the whole compass of the English tongue, we are at a loss to determine. It says, as plainly as words can disclose, "We command that no such work as that referred to shall at any time be done except as is herein set down, and we prohibit any such work from being done at anytime in any other way." It is mandatory and prohibitory to every department of the Government, and every officer of each department. By its very terms it is binding upon all, and goes into effect as soon as the Constitution becomes the

organic law, as it is strongly prohibitory. We could not hold otherwise, without disregarding the plain meaning of words and the rule laid down for its interpretation in the 22d section of the first article.

In our opinion, this section (19 of Article XI) requires no legislation to enforce it; and further, that the provisions of the Act of April 1, 1872, authorizing the Superintendent of Streets, etc., of the city and county of San Francisco to execute the contract under consideration, ceased to be operative on the 1st day of January, 1880, as inconsistent with the section referred to.

From such a construction it follows that the alternative writ issued heretofore must be quashed, and the proceeding dismissed. So ordered.

DEPARTMENT NO. 2.

[Filed March 2, 1880.]

[No. 6170.]

PEOPLE vs. SAN FRANCISCO GASLIGHT CO.

DOCKAGE in San Francisco is collected to assist in the expenses of dredging.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

J. B. Lamar, for appellant.
R. P. & H. N. Clement, for respondent.

By the Court, MYRICK, J.:

During the continuance of the lease set forth in the transcript, the defendant has the legal right to retain the moneys received by it on account of the vessel *Mariano*, whether it be called dockage or a collection for a share of the expense of dredging. We do not mean to say that defendant has a legal right to collect dockage as dockage rates or tolls, but by virtue of contract with vessels doing business with it. The plaintiff has not the legal right to collect dockage for vessels landing at the premises leased, provided the vessels be engaged in the business of defendant. Dockage is collected to assist in the expense of dredging; and, by the terms of the lease, defendant is to do all the dredging free of expense to the State. It has the right to require that vessels doing business with it shall share in that expense.

Judgment affirmed.

DEPARTMENT NO. 1.

[Filed February 21, 1880.]

[No. 6122.]

MARSTON vs. SIMPSON ET AL.

RESCISSION OF CONTRACT. It is the duty of a party to a contract who desires to rescind to do so promptly upon discovering the facts which entitle him to rescind. Within six months after learning that shares of stock reported to be worth $10 per share were actually worthless, held to be sufficient.

FALSE REPRESENTATIONS OF A FRIEND AND NEIGHBOR. As a general rule, for certain purposes the law will presume a person to have notice of facts in respect to which he has been put upon inquiry; but where as a reasonable man he might place confidence in another, the law will not impose on him the necessity of absolutely ignoring the persistent asseverations of a "friend and neighbor."

Appeal from the District Court of the Third Judicial District, Alameda County.

B. Williams, for appellants.

Batchelder & Moore, for respondent.

By the Court, MCKINSTRY, J.:

The plaintiffs, having tendered a return of the three hundred and fifty shares of the stock of a mining corporation which constituted the consideration for the sale of the lands, prayed for a decree rescinding the agreement for sale and purchase, and that defendants be compelled to reconvey the legal title.

It is urged by appellants that plaintiffs did not tender a return of the stock, or give notice of their intention to rescind the agreement within a reasonable time after they discovered that fraud had been practiced upon them.

It was doubtless the duty of plaintiffs to rescind promptly "upon discovering the facts" which entitled them to rescind. (C. C., 1691.)

The Court below found that on the 6th day of June, 1876, the plaintiffs caused to be served on defendants a notice in writing to the effect that they proposed to rescind said sale and conveyance on the ground of fraud, and tendered to said defendants the shares of stock, etc.

The Court also found that the plaintiffs had no knowledge of the market and selling value of the stock until within six months prior to the commencement of this action, which was begun on the 7th of June, 1876. The fraud complained of consisted of misrepresentations by the agent of defendants to the effect that the stock was of the value of $10 per share, when in truth, as alleged, it was worthless. The finding that

plaintiffs had no knowledge of the value implies and includes a finding that they had no knowledge that the representations of defendants' agent were false; and we cannot say, as a matter of law, that a delay to offer to rescind for a period of a little less than six months was such *laches* as must deprive the plaintiffs of their right to relief.

It is said, however, that the finding that plaintiffs had no knowledge of the value until within six months is not sustained by the evidence.

Appellant's counsel has arrayed in his brief, in consecutive order, the statements of witnesses which tend to show that plaintiff did in fact have knowledge of the real value, and that the representations of the agent were false, at an earlier date than as found by the Court below.

"The plaintiff Marston says in his testimony: 'I never ascertained this stock had any value or anybody else. I *soon* found that no one had ever asked more than $5 per share, and that is all I know about it. After I became the owner of the stock it was very natural, and I did, after some reasonable time, make inquiries to see what the stock was worth, but I could not find anybody who said the stock was worth anything; made inquiries there in the office from such men as I saw that knew something about it; think I talked with the Hardys about it; that might have been a week after the sale. * * * A good many people said things to me which created a distrust in my mind. It was what everybody said, if they said anything. Murray told me as soon as I got it, 'you are *sold*.' He said, 'I have been all through that country, and I would not give you four bits for your ten dollars a share.' This was the very next day after I got the stock.'

"Plaintiff's son says he ascertained the stock had no value about a week after the trade, and told his father."

It is undoubtedly true that for certain purposes the law will presume a person to have notice of facts in respect to which he has been put upon inquiry.

But where, as in this case, there are special reasons why one party should, and as a reasonable man might, place trust and confidence in another, the law will not impose on him the necessity of absolutely ignoring the persistent asseverations of his "friend and neighbor." (Finding 2.) In other words, in determining whether the plaintiff, Jotham Marston, was guilty of neglect in not sooner ascertaining that the stock was of no value, the Court below properly considered the representations themselves, coming as they did from one to whom he had a right to give his confidence, and required that the evidence, to overcome the reliance he placed on the

statements of his friend and neighbor, should be greater than such as would excite suspicion in one who had been dealing with a stranger. The Court found as a fact that, until the period mentioned, the plaintiffs continued to rely upon the statements of Gregory, and to believe them true. We cannot say that Jotham Marston ought not to have relied upon Gregory's statements up to the date when he ceased to regard them as trustworthy, nor that he was bound to reject them as false before the accumulated evidence was such as brought home to his mind the conviction of their falsity, notwithstanding his struggle to retain his faith in one with respect to whom he had occupied such familiar relations.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed March 1, 1880.]

[No. 6331.]

WOLF vs. MARSH.

CONTRACT BROKEN. If one voluntarily puts it out of his power to do what he agreed, he breaks his contract, and is immediately liable to be sued therefor without demand, even though the time specified for performance has not expired.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

Pringle & Hayne, for appellant.

L. Reynolds, for respondent.

By the Court, SHARPSTEIN, J.:

This is an action upon an instrument in writing, of which the following is a copy:

"[449.00.] MARTINEZ, November 24, 1866.

"For value received, I promise to pay to S. Wolf, or order, four hundred and forty-nine dollars, with interest at one per cent. per month from date until paid, principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void.

"(Signed) C. P. MARSH.]"

It appears by the pleadings, evidence, and findings that at the date of this instrument, and thereafter until the first day of November, 1871, the defendant was the owner of the one undivided half of said ranch, and that the coal mines

which it contained were under lease to the Poso Coal Company at a rent of thirty-three cents per ton for each ton of coal that might be taken from said mines. That up to said first day of November, 1871, the mines had yielded the defendant no profits, and that on the last named day the defendant conveyed his entire interest in the ranch, including the mines, to one Williams. This action was commenced within four years after the date of said conveyance. There was a demurrer to the complaint on the grounds—first, that it did not state facts sufficient to constitute a cause of action; and second, that the cause of action was barred by the provisions of section 337 of the Code of Civil Procedure. The demurrer was overruled, and the defendant answered the complaint. The case was regularly tried by the Court, which rendered its judgment in favor of the plaintiff. The defendant moved on a bill of exceptions for a new trial, which was denied; and from that judgment, and the order denying the motion for a new trial, the defendant appealed to this Court. The grounds upon which the appellant here seeks to have the judgment and order reversed are, that the action is barred by the Statute of Limitations, and that it is not proved or found that the coal mines in the Marsh Ranch have ever yielded any profit.

Upon the point that the action was barred by the Statute of Limitations it is sufficient to remark that we are unable to discover any ground upon which that point can be sustained; and if we are right in the view which we take of the other point, it must be apparent that the statute did not commence running more than four years before the commencement of this action. The instrument sued upon consists of two parts, a promissory note and a condition upon which it was not to be paid, but to be null and void. That condition was that the coal mines in the Marsh Ranch should yield no profits to the defendant. If they at any time should yield profits to him, the note would then become due and payable. From that time the Statute of Limitations would commence to run, because at that time a cause of action would accrue upon the note. Prior to the first day of November, 1871, the date of defendant's conveyance to Williams, the mines had yielded no profits to defendant; and if he had retained his interest in them up to this time, or for any length of time, without their yielding any profits to him, no cause of action would have accrued upon the note. But, as before remarked, upon the mines yielding profits to the defendant the note became due and payable *eo instanti*.

Before the mines had yielded any profits to the defendant he sold and conveyed his interest in them to a stranger. By

so doing he voluntarily put it out of his power ever to realize any profits from the mines. However great the yield of profits from them might be after that, they could yield none to him. And the principle is elementary that "if one voluntarily puts it out of his power to do what he had agreed, he breaks his contract, and is immediately liable to be sued therefor without demand, even though the time specified for performance has not expired." (Bishop on Cont., sec. 690.)

That this case is within that principle we do not entertain a doubt. When the note was executed the defendant was a half owner of the mines, which were leased on such terms that the production of coal from them must have yielded him a profit. After making the note he voluntarily committed an act which made it impossible for the contingency upon which the note would become due and payable ever to arise. When he did that he violated his contract, and the note at once became due and payable; and as this action was commenced within four years after that, it follows that the judgment and order of the Court appealed from must be affirmed.

DEPARTMENT No. 2.

[Filed February 28, 1880.]

[No. 6302.]

IN THE MATTER OF THE ESTATE OF BERNARD BURNS.

PROBATE—SETTING APART HOMESTEAD. Appeal from order setting apart homestead.

Appeal from the Probate Court of San Francisco County.

Stetson & Houghton, *R. Thompson*, and *F. H. Berlin*, *for* appellant.

M. C. Hassett, for respondent.

By the Court, MORRISON, C. J.:

The transcript on appeal shows that Bernard Burns departed this life intestate in the city and county of San Francisco on the 8th day of December, 1876, leaving real estate situate in said city and county. That, on the 22d day of December of the same year, letters of administration were duly issued to Lizzie Burns, the widow of said deceased, by the Probate Court of the city and county of San Francisco; and adminis-

tration of said estate was duly had in said Probate Court. That on the 19th day of January, 1877, Lizzie Burns presented her petition to said Court, setting forth that the deceased, Bernard Burns, had not selected and recorded a homestead upon his real estate during his lifetime; that on the 12th day of January, 1877, an inventory and appraisement of the real estate of said deceased was duly filed in said Probate Court, by which it appears that the said Bernard Burns died, seized of a certain piece or parcel of land (describing it) situate in said city and county of the value of $3,000, and concluding with a prayer that said lot of land be set apart to her as a homestead. The application of said Lizzie Burns was duly considered by the said Probate Court, and on the 26th day of January, 1877, a decree was entered by said Court setting apart said lot of land to the use of petitioner as a homestead. There was no appeal from this decree; but on the 16th day of July, 1877, one Ann Gordon, representing herself to be a sister of the deceased, Bernard Burns, presented a petition on her own behalf, as well as on behalf of certain other heirs of the deceased, praying the Court to set aside, vacate, and annul said order of January 26, 1877. To this petition a demurrer was interposed by Lizzie Burns on the 17th day of August, 1877, and on the 25th day of the following month said demurrer was sustained by the Probate Court.

On the 17th day of January, 1878, another petition was presented on behalf of the same parties for a final account and distribution of the estate of said Bernard Burns, and praying that the said Lizzie Burns be cited, and required to render to said Probate Court a full, complete, and final account of her administration of the estate of Bernard Burns, of all the property thereof, both real and personal.

It is apparent that an attempt was thus made to accomplish indirectly what the same parties had failed to obtain by the former petition in July 16, 1877.

This application was denied by the Court on the 1st day of April, 1878, and on the 12th day of the same month a motion for a new trial was made, which motion was denied on the 16th day of July, and on the 12th day of September petitioners filed a notice that they appealed to the Supreme Court "from the order of the Probate Court, made and entered on the 16th day of July, overruling a motion for a new trial upon the matters contained in said petition, and from the whole thereof."

The only question presented to this Court in the argument of the appeal relates to the validity of the order of the Pro-

bate Court of Januaay 26, 1877, setting aside to Lizzie Burns, as a homestead, a certain lot, the same being a part of the estate of her deceased husband.

It is claimed on behalf of the appellants that the Probate Court had no power to set apart said lot as a homestead for three reasons:

First, because said lot was vacant and unimproved, and never had the character of a homestead impressed upon it during the lifetime of Bernard Burns; secondly, because it exceeded in value the sum of one thousand dollars; and thirdly, because no notice of the proceeding setting apart the homestead was given to the heirs of the deceased Bernard Burns.

Section 1465 of the Code of Civil Procedure provides that "Upon the return of the inventory, or at any subsequent time during the administration, the Court or the Probate Judge may, on his own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or the minor children of the decedent, all property exempt from execution, including the homestead selected, designated, and recorded. If none has been selected, designated, and recorded, the Judge or the Court must select, designate, set apart, and cause to be recorded a homestead for the use of the persons hereinbefore named, in the manner provided in Article II of this chapter, out of the real estate belonging to the decedent."

The homestead mentioned and provided for in Article II must not exceed in value the sum of $5,000. (Section 1475, Code of Civil Procedure.)

"When the homestead has been set apart, it ceases to be a part of the assets of the estate, and neither the court nor the administrator has any further power over it; and it has become, for all further purposes of the administration, as if it had never existed." (*In the Matter of the Estate of Orr*, 29 Cal. 101.) The order of the Probate Court, of April 1, 1878, was therefore properly made.

It is unnecessary for us to determine on this appeal whether the decree of January 26, 1877, setting apart the homestead to the widow of Bernard Burns, was regular or otherwise. It was an appealable order under section 969 of the Code of Civil Procedure; and section 1715 of the same Code requires such appeal to be taken within sixty days.

The notice of appeal in this case was not filed until September 12, 1878, which was too late to make the order complained of a proper subject of review by this Court.

Order affirmed.

DEPARTMENT No. 2.

[Filed February 23, 1880.]

[No. 5782.]

PRESTON ET AL. vs. THE EUREKA ARTIFICIAL STONE COMPANY.

ACCIDENT OR SURPRISE. Where an attorney has actual though not formal notice of the rendition of a judgment rendered against his client, and delays application for a new trial for more than a year, he cannot complain of having been prevented from having a fair trial by reason of irregular proceedings of the Court, nor of accident or surprise which ordinary prudence could not guard against.

Appeal from the District Court of the Fifth Judicial District, San Joaquin County.

J. M. Hogan, *J. H. Budd*, and *Terry, McKenne & Terry*, for the appellants.

J. F. Baldwin and *Aug. Munter*, for respondent.

By the Court, SHARPSTEIN, J.:

This is an appeal from an order denying the defendant's motion for a new trial. The motion was based upon a bill of exceptions and affidavits, from which it appears than in July, 1876, the case was transferred from its proper place on the calendar to the foot of it, on account of the absence of the plaintiffs' attorney, who was in the Atlantic States during a part of that and the preceding month. On his return in the latter part of July, by an *ex parte* motion, he had the case advanced on the calendar, so that it was reached for trial on the 31st of July. Prior to the last mentioned date Mr. Splivalo, who had been the attorney of the defendant, substituted E. J. and J. H. Moore as attorneys in his place, and they served notice of their substitution upon the plaintiffs' attorney on the 17th of July, 1876. The substitution, however, has never been filed with the clerk. There is an entry in the minutes of the Court of July 31, 1876, which reads as follows:

"This cause came on regularly for trial. Mr. Van Dyke appeared for plaintiffs, and Mr. Splivalo for defendant. Whereupon, by consent of respective counsel in open court, it is ordered that judgment be entered in favor of plaintiffs and against defendant for the sum of $1,187.35 in gold coin of the United States of America, with costs. By consent of respective counsel, it is ordered that proceedings be stayed for sixty days."

Mr. Splivalo states in his affidavit that he was not in court

on the day when the case is stated in said minutes to have come on for trial, and gave no consent to, and knew nothing of, the proceedings therein mentioned.

Joseh H. Moore states in his affidavit that he met plaintiffs' counsel in the court room on the day upon which the case was called and judgment rendered; and when said plaintiffs' counsel told him (Moore) that the cause would soon be called for trial, he says: "I told him he must proceed as he thought fit; that I should not give consent to any proceedings in the matter; and I then withdrew from the court room. I did not consent to the order for judgment entered herein, or to any other order, and was not present in court when it was made and entered."

Mr. Van Dyke, counsel for plaintiffs, in his affidavit states distinctly that it was agreed between him and said Moore that judgment should be entered as the minutes state. He says that he does not recollect whether Mr. Splivalo was present or nor; and after the notice of substitutlon was served, it was immaterial whether he was or not.

After the service of that notice upon plaintiffs' attorney it would have been clearly improper for him to have recognized any other than the substituted attorneys of the defendant as its attorneys in the action. That one of the substituted attorneys was present in court on the day that the cause was called for trial, and was informed that it would be called for trial on that day, and made no objection to the Court, and, as we construe his statement, none to the plaintiffs' counsel, to its being taken up and disposed of at that time, is not controverted. Besides, Mr. J. H. Moore, one of the substituted attorneys, states that on the day of the rendition of the judgment, and after it had been rendered, he went to the Clerk of the Court and requested him to have the fact of its rendition published.

The notice of motion for a new trial is dated more than a year after the judgment was rendered. It was technically within the time allowed by law, as no formal notice of the rendition of the judgment had been served in the meantime. But it is scarcely credible that the defendant, whose counsel knew of its rendition from the date thereof, would have delayed his attack so long if there had been any "irregularity of the proceedings of the Court and of the adverse party by which the defendant was prevented from having a fair trial."

It is unnecessary to add that upon the defendant's own showing there is nothing tending to establish a case of "accident or surprise which ordinary prudence could not have guarded against."

And upon the material facts as presented by the affidavits, submitted on behalf of the defendant, without looking into those submitted by the other side, we would be compelled to affirm the order of the Court below.

Order denying the motion for a new trial affirmed.

DEPARTMENT No. 2.

[Filed March 3, 1880.]

[No. 6365.]

STRATHERN vs. THE ROCK ISLAND G. & S. M. CO.

INSUFFICIENT COMPLAINT in an action relative to the shares of stock of a corporation.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

W. H. Allen, for appellant.
Estee & Boalt, for the respondent.

By the Court, SHARPSTEIN, J.:

The allegations of the complaint in substance are that one Calderwood obtained a judgment against the defendant corporation for the possession of 1,333⅓ shares of its capital stock, or $15,666.66. That prior to said judgment, Calderwood, for a valuable consideration, transferred to the plaintiff in this action 250 shares of said stock, or $2,937.50, which would be the equivalent of 250 shares of said stock in the event of said judgment being paid in money. That after said judgment was entered, the plaintiff demanded of the secretary $2,937.50; and he refused to pay that sum, or any part thereof. It appears, however, by another allegation of said complaint that the judgment against the defendant and in favor of Calderwood had been satisfied of record by the order of the court in which it was obtained before said demand was made upon the secretary of the defendant corporation for the sum above specified.

The complaint was demurred to on seven specified grounds, and the demurrer was sustained. We think that it might very properly be sustained upon any one of a majority of the grounds specified. The plaintiff omitted to amend his complaint, and judgment was rendered against him; and from that judgment this appeal was taken.

Judgment affirmed.

IN BANK.

[Filed February 2, 1880.]

[Nos. 6906.]

CEREGHINO vs. FINOCHIO.

On application for a writ of review.

BY THE COURT:

In this cause there has been no excess of jurisdiction by the Court below, and the action of that Court can be reviewed on appeal. (C. C. P., section 1068.) The application is therefore denied.

Abstract of Recent Decisions.

OREGON.

U. S. DISTRICT COURT—DEADY, J.

FORFEITURE. Whether a forfeiture given by statute takes effect upon the commission of the act on account of which it is given, or upon the seizure or condemnation of the property, depends primarily upon the intention of Congress as evidenced by the language of the statute; but when that is doubtful or uncertain, resort may be had to the rules of the common law relating to forfeitures. Rule at common law.—*The Kate Heron*, decided November 18, 1879.

LIABLE TO FORFEITURE. Section 4189 of the R. S., which declares that for the commission of a certain act a vessel "shall be *liable* to forfeiture," does not affect a present, absolute forfeiture, but only gives a right to have the vessel declared forfeited upon due process of law, and the property in the same remains in the owner until seizure and condemnation, which latter relates back to the time of seizure and invalidates all intermediate sales.—*Id.*

BONA FIDE PURCHASER. A purchaser in good faith of a vessel liable to forfeiture under said § 4189, and before seizure acquires the title thereto, may hold the same against the United States.—*Id.*

WYOMING.

LEGISLATIVE JURISDICTION. The Wyoming Territorial Legislature attempted to authorize the imprisonment of its con-

victs in a penitentiary of Nebraska. In the late case of Wm. Webster, Judge Peck held the statute void for want of jurisdiction in the Legislature to enact it. Citing *Ableman* vs. *Smith*, 21 How. U. S. R. P., and the maxim of law that a sovereign power cannot exercise jurisdiction beyond its territorial limits, he says: "No court can pass a sentence which it cannot execute—this is a self-evident proposition. It can execute its sentence only by a warrant, for by this process alone is the officer authorized to enforce the sentence. Now, no process can operate beyond the territorial limits of the government which they represent. Those limits are jurisdictional; hence the instant that the convict is taken beyond the boundary of the territory under a process of its court, the process fails."

IDAHO.

PRACTICE AND OFFICES. The Supreme Court, by Morgan, C. J., in *Glidden* vs. *Curtis*, has held (1) that an action to remove a probate judge may be brought in the name of the people; (2) that in such case the verified allegations of the complaint may be answered by denials upon information and belief; and (3) that under section 1854 of the Revised Statutes a member of the legislative assembly is disqualified for three years from the beginning of his term from holding any office which has been created or the salary of which has been increased during his term.

EXEMPTING RAILROADS FROM TAXATION. In the Third District Court of Idaho, Morgan, J., has, in the record case of the *Utah and Northern Railway Company* vs. *Crawford*, decided the following points:

1. That the Legislative Assembly had power to pass the Act of January 9th, A. D. 1873, exempting railroads from taxation.

2. That said act, when accepted by the railroad company, became a contract, and was not repealed by the general revenue law of January 15, 1875.

3. That the Fort Hall Indian Reservation is not within the jurisdiction of the county officers of Oneida County, and that it is not therefore in the power of said officers to levy and collect taxes upon so much of said railroad as lies within said reservation.

4. That it is necessary for the railroad company to allege and prove a compliance with the provisions of the above first mentioned act to secure said exemption.

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Current Topics.

THE Supreme Court of the United States, in *The National Savings Bank of the District of Columbia* vs. *William H. Ward*, has recently delivered a very important opinion as to the liability of attorneys-at-law for care and skill in the performance of professional duties, holding an attorney liable for $3,500 lost by a loan upon property the title to which the attorney had examined and pronounced good, but which proved to be worthless. As soon as we can spare the space we will publish the opinion, or at least an abstract of it. It is very lengthy, and well considered.

THE end of the present session of the Legislature is rapidly approaching. More than two-thirds of the time has elapsed—only thirty-three days remaining—and during the last ten days no new bills can be introduced. So far, most of the time which has not been wasted has been occupied with such important measures as the revenue law and the Chinese question. The numerous amendments to the Code made necessary by the change of Constitutions have not, with a few exceptions, reached the advanced stage of safety. There is danger in this delay, and our law-makers will have no time to spare, from this time on, for political speeches or partisan schemes of any kind. The Governor stands pledged not to call an extra session, so we hope there will be no time lost in attending to *necessary* legislation.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed March 8, 1880.]

[No. 6334.]

GEORGE SHERMAN vs. JOHN McCARTHY ET AL.

PARTY BY FAVOR. One who is permitted to become a party defendant upon condition that he will answer and proceed at once to trial cannot complain if he is not allowed to demur.

PATENT ISSUED TO ADMINISTRATOR in his personal capacity conveys the legal title which must prevail in ejectment.

AN EQUITABLE DEFENSE must be specially pleaded.

FICTITIOUS NAME. It is no ground of reversal that a party sued by a fictitious name was not afterwards made a party by the real name.

DESCRIPTION OF LAND—IDENTITY OF NAME—DEED SUBSTANTIALLY GOOD—DELIVERY.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco.

Mills & Jones, for appellant.

Thomas A. Brown, for respondents.

By the Court, MORRISON, C. J.:

This is an action of ejectment to recover a portion of what is called the "San Pablo Rancho," and the appeal is taken from the late District Court of Contra Costa County. There are numerous parties defendant, only two of whom, Peter Magraff and Mary E. May, have appealed; the former from the judgment and order denying a motion for a new trial, and the latter simply from the order denying the motion for a new trial. Numerous errors have been assigned to the proceedings in the District Court, which we will proceed to examine and dispose of in the order in which they were presented in this Court.

The first one is, that the Court below refused to allow the defendant, Mary E. May, to file and serve her demurrer to the complaint.

It appears from the transcript that Mary E. May was not originally a party to the action, and that she was permitted to come in, as a party defendant, on certain terms and conditions prescribed in the order of the District Court, one of which conditions was that she should *answer forthwith and proceed at once to trial.* Mary E. May applied for a leave to defend, not as a matter of right, and would have no just cause of complaint if the privilege had been denied her. She would not have been affected by the judgment, and was in no

sense a necessary party to the action. But the Court, as a matter of favor, allowed her to come in; and as a condition to the granting of the privilege, required her to answer to the merits and *proceed at once to trial.* It appears that the case was ready for trial, and had been regularly called in its order on the calendar. Indeed, all the other parties had answered "ready," and it was intended that the trial should proceed at once. There was no error, therefore, in imposing the conditions complained of; and by making herself a party upon the stipulated terms, Mary E. May agreed thereto, and cannot now be heard to complain thereof.

2. The next error assigned is, that Mary E. May was, in a manner not provided for in the Code of Civil Procedure, denied the right of a jury trial. But the transcript presents a sufficient answer to this alleged error. On page 21 of the transcript is found the following language: "The said defendant, Mary E. May, then filed her answer herein, and then and there demanded a trial by jury, which application was overruled by the Court, the jury having been discharged for the term, *and a jury trial having been waived* and the cause having been set down to be tried by the Court without a jury."

3. The next error assigned is, that Mary E. May is not named as a party defendant, and her name was never inserted in the complaint. This is no ground for reversal of the judgment, even if there were no other answer to the objection. (*Mahon* vs. *San Rafael T. R. Co.*, 49 Cal. 272.)

It will be observed, too, that this is not an appeal on behalf of Mary E. May from the judgment, but is simply an appeal from the order of the Court denying her motion for a new trial. But there is another answer to the objection, and that is, an order of the Court was duly made, substituting the real names of the defendants sued by fictitious names in all proceedings thereafter had in the case. If therefore it be true, as is contended, that Mary E. May was sued by a fictitious name, the objection on this appeal that her real name was not incorporated in the complaint is sufficiently answered by the above order of substitution.

4. Objection is made that the complaint is fatally defective, on the ground that it contains no definite description of the land sued for, as it does not give the starting point. The only evidence on the subject is that of one Taylor, who was called as a witness on behalf of the plaintiff, and testified as follows: "I am a surveyor. [Here insert map.] I made that survey and made that map, and I know the land there shown. The different parties, as shown in the dia-

gram at the margin of the map to have been in possession of the different tracts, were in possession of those tracts at the time I made the survey. The starting point mentioned in the description is certain and definite, and there can be but one such point."

5. The next point made on the appeal relates to the legal operation and effect of the patent under which plaintiffs claim title. The patent, among other matters, contains the following recitals: "Whereas, it appears from a duly authenticated transcript filed in the General Land Office of the United States, that pursuant to the provisions of the Act of Congress, approved the 3d day of March, 1851, entitled 'An act to ascertain and settle the private land claims in the State of California,' Joaquin Ysidro Castro, administrator of the estate of Francisco Maria Castro, deceased, as claimant, filed his petition on the 9th day of October, 1852, with the Commissioners, to ascertain and settle the private land claims in the State of California, sitting as a Board in the city of Los Angeles, in which petition he claimed the confirmation of title to a tract of land known by the name of 'San Pablo,' situated in the county of Contra Costa and State aforesaid, said claim being founded on two Mexican grants to the heirs of Francisco Maria Castro, deceased. * * * And whereas, the Board of Land Commissioners aforesaid, on the 17th day of April, 1855, rendered a decree of confirmation in favor of the claimant, which decree or decision, having been taken by appeal to the District Court of the United States for the Northern District of California, the said District Court, in the case entitled *The United States* vs. *Joaquin Ysidro Castro*, rendered its decision as follows, to-wit: 'It is by the Court hereby ordered, adjudged, and decreed that the said decision be and the same is hereby affirmed; and it is likewise further ordered, adjudged, and decreed that the claim of the said appellee is a good and valid claim, and the same is hereby confirmed to the extent of four square leagues. * * * Now, know ye that the United States of America, in consideration of the premises, and pursuant to the provisions of the Act of Congress aforesaid, of the 3d of March, 1851, and the legislation supplemental thereto, have given and granted, and by these presents do give and grant, unto the said Joaquin Y. Castro and to his heirs the tract of land embraced and described in the foregoing survey; but with the stipulation that, in virtue of the 15th section of the said act, neither the confirmation of this said claim nor this patent shall affect the interests of third persons. To have and to hold the said tract of and

with the appurtenances unto the said Joaquin Y. Castro and to his heirs and assigns forever, with the stipulation aforesaid.'"

It is claimed on behalf of the appellant that the above patent is void; but no authority is cited in support of such a view, and we are unable to see any good reason for such a conclusion.

The proceedings before the Board of Land Commissioners show that Joaquin Y. Castro presented his petition before that Board as administrator, and the patent grants the land to him, not in his representative but in his personal capacity; but this does not affect the validity of the instrument. The most that can be contended for is, that the patent should have issued to Castro as administrator, and that therefore he holds the lands granted as trustee for the heirs of Francisco Maria Castro. But even if the patent had issued to him as such administrator, it would have vested in Joaquin Y. Castro the legal estate with power of disposition, as has been held by this Court. In the case of *Bonds* vs. *Hickman*, 29 Cal. 465, the Court says: "We cannot hold the patent void because it was issued to the administrator of the deceased assignee of the warrant, for it is not forbidden by law to be so issued in such cases. It is not shown upon the face of the patent that it was issued for land to which the deceased had the right of pre-emption; and if such was in truth the case, though not recited in the patent, it is not liable to be attacked collaterally on that ground." And in the same case, when again before the Court (32 Cal. 204), the learned Judge delivering the opinion of the Court, says: "The defendant objects that it does not appear that the deed from James Smith to the plaintiff was made by him as the administrator of Robert Smith, deceased. The patent was to 'James Smith, administrator of Robert Smith, deceased.' The title, which passed by reason of the patent and the proceedings on which it was founded, vested in James Smith, the patentee named. Whether he held it in trust for others we are not informed by the case before us, and we are not aware that it could in any event be a proper subject of inquiry in this action. We are of opinion that the Court erred in excluding the deed from James Smith to the plaintiff, and for that reason the judgment should be reversed and a new trial granted."

The plaintiff in this action deraigns title through Joaquin Y. Castro, and the legal title was vested in him at the time this action was brought. (*Littlefield* vs. *Nichols*, 42 Cal. 372.)

If it be true, as claimed by appellant, that there was a trust in favor of the heirs of Francisco Maria Castro and

their grantees, the facts establishing such trust should have been set up in defendants' answer. The legal title must prevail in an action of ejectment, and an equitable defense must be specially pleaded. Both of these principles are well settled. (*Estrada* vs. *Murphy*, 19 Cal. 248; *Lestrade* vs. *Barth*, *Id.* 660; *McCauley* vs. *Fulton*, 44 Cal. 362; *Hartley* vs. *Brown*, 46 Cal. 202.)

But, independent of principle and authority as established by the above cases, the validity, operation, and effect of this patent were under consideration and were passed upon by the Court in the case of *O'Connell* vs. *Dougherty*, 32 Cal. 458, and it was there held that the patent vested the legal estate in Joaquin Y. Castro, under whom plaintiff claims title in this action.

Two or three other points are made on this appeal, which we will briefly dispose of.

The identity of "Perre" and "Perez" is sufficiently established, and it appears that the two names represented but one and the same person.

The deed from Nicholas Hunsaker was executed by him as Sheriff; and although somewhat informal, is substantially good.

There is sufficient evidence in the transcript to prove a delivery of the deed from Tewksbury to Sherman, the plaintiff in this action.

We fail to find any error in the transcript to justify a reversal of the judgment, and therefore we affirm the same, as well as the order denying defendants' motion for a new trial.

Judgment and order affirmed.

Mr. Justice McKinstry, being disqualified, did not participate in the decision.

DEPARTMENT NO. 2.

[Filed February 23, 1880.]

[No. 6220.]

HARDENBERG vs. HARDENBERG.

INSUFFICIENT FINDING.

Appeal from the Third District Court, Alameda County.

Montgomery & Martin, for appellant.

W. Van Voorhies, for respondent.

The judgment is reversed on the authority of *Ladd* vs. *Tully*, 51 Cal. 277, and *People* vs. *Forbes*, *Id.* 628.

DEPARTMENT No. 1.

[Filed March 3, 1880.]
[No. 6305.]

TRENOUTH vs. FARRINGTON.

STATUTE OF LIMITATIONS—JUDGMENT. An action upon a judgment must be brought within five years from the time the judgment was entered and not from the time it was rendered.

Appeal from the District Court of the Fourth Judicial District, San Francisco.

M. Lynch, for appellant.

P. G. Galpin, for respondent.

By the Court, ROSS, J.:

This is an action upon a judgment. The defense is the Statute of Limitations. The facts are, that on August 26, 1871, plaintiff commenced suit in the Fourth District Court against the defendant to recover three hundred and eighty dollars, with interest and costs. The defendant filed a demurrer in that action, but subsequently withdrew the demurrer, with leave to answer within ten days. He failed to answer, and on the 20th of March, 1872, his default was, on motion of plaintiff's attorney, entered in the cause; and the Court thereupon heard proof on the part of the plaintiff, and ordered that a judgment be entered in favor of the plaintiff for the sum of $405.74, together with costs of suit. The judgment so ordered on the 20th of March was not in fact entered until the 25th of March, 1872. The present action was commenced March 23, 1877. If therefore the statute commenced to run from the date the Court ordered the judgment to be entered, as was held by the Court below, the present action is barred. On the other hand, if the date when the judgment was reduced to a tangible form, and in fact entered, be taken as the starting point, this action was commenced in time, and the judgment and order must be reversed.

The cases of *Gray* vs. *Palmer*, 28 Cal. 416; *Peck* vs. *Courtis*, 31 Cal. 209; and *Genella* vs. *Relyea*, 32 Cal. 159, cited by counsel for respondent, in support of the judgment, do not apply to this case. The question in those cases was as to what was the starting point of the time within which an appeal could be taken under the then existing statute, which provided that an appeal might be taken from a judgment within one year from "the rendition of the judgment;" and the Court held that the time ran from the day the judgment was announced by the Court.

But in this case we have a different statute to deal with. The words of the statute prescribing the time for the commencement of this class of actions are:

"Within five years."

1. "An action upon a judgment on decree of any court of the United States, or of any State within the United States."

The judgment here spoken of is a complete judgment—one that has been reduced to a tangible form—a record. In the case at bar it will be observed that the Court did not itself enter judgment; it only ordered that judgment *be* entered. This was not in fact done until five days afterwards, when for the first time the judgment became a matter of record and a complete and final judgment. In our opinion it was from this date that the statute began to run.

Judgment and order reversed, and cause remanded for a new trial.

DEPARTMENT NO. 2.

[Filed March 2, 1880.]

[No. 6175.]

SOULE vs. SAN FRANCISCO GASLIGHT CO.

STATE HARBOR COMMISSIONERS. Rates to be charged.

Appeal from the District Court of the Nineteenth District, San Francisco.

J. B. Lamar, for appellant.

R. P. & H. N. Clement, for respondent.

By the Court, MYRICK, J.:

The rate of toll fixed by the Board of State Harbor Commissioners is: Coal, ten cents per ton; all merchandise landed upon wharves from vessels and taken from thence to lighters or other vessels, or warehoused without drayage, must pay six and a quarter cents per ton wharfage. In this case coal was landed and placed on the wharf from vessels and removed by defendant on cars run upon a tramway supported by pillars resting on the wharf, and was warehoused without being hauled on drays. The wharf was built, and has at all times been kept in repair, by defendant at its own cost. The Court below held that defendant was bound to pay six and a quarter cents per ton, and rendered judgment accordingly. Both parties appealed.

The difference between the two rates was evidently intended to cover the wear and tear of wharves by the passing of loaded means of conveyance. It makes no difference, as far

as the question before us is concerned, whether the conveyance by wagons, drays, or cars; whether on tramways resting on pillars ten feet high, or timbers six inches above the wharf, or on rails resting immediately on the wharf. In this case the wear and tear is not at the cost of the Board of State Harbor Commissioners; the cost is borne by the defendant. The wharves of the city are generally built and maintained by the Board and are under its control, and it would certainly be prudent for the Board to make regulations to cover wear and tear under various circumstances.

We think that the fact that defendant built and maintains the wharf might be a proper element to enter into the construction of the rule establishing the rate of toll, were it not for the fact that the lease in this case contains the provision that "all freight landed or placed on said wharf shall pay to said Board of State Harbor Commissioners the same rates of toll from time to time as shall be charged or collected on other wharves upon the water front of said city and county of San Francisco under the control of said Board of State Harbor Commissioners." We are therefore of opinion that the toll to be paid by defendant is ten cents per ton.

This cause is remanded to the Superior Court of the city and county of San Francisco, with instructions to modify the judgment in accordance with this opinion.

DEPARTMENT NO. 1.

[Filed February 23, 1880.]

[No. 10,455.]

PEOPLE vs. GREEN.

PERJURY—MATERIAL EVIDENCE. In a trial for perjury alleged to have been committed by the defendant, by falsely testifying in a murder trial that he had seen the deceased subsequent to the day the murder was committed, evidence of such testimony is material to the charge.

Appeal from the County Court of Tulare County.

N. O. Bradley, for appellant.

Attorney-General, for respondent.

By the Court, ROSS, J.:

The defendant was convicted of the crime of perjury in the county of Tulare, and brings this appeal from the judgment of conviction, and also from the order denying his motion for a new trial.

It appears that two brothers, named Michael and James Maher, were engaged as partners in raising sheep near Tip-

ton, Tulare County, in the year 1876. That in the month of July of that year they went with their sheep to the mountains, and that both of them were supposed to have been afterwards killed. On the 7th of March, 1878, one J. J. Kerrick was indicted by the grand jury of Tulare County for the murder of Michael Maher. The indictment in that case charged Kerrick with having murdered Michael on or about the 20th of August, 1876. The defendant Green was a witness for Kerrick on the trial of the charge against him, and the indictment in the present case charges that Green on that occasion willfully and falsely testified, among other things, that he saw James Maher on the last day of August or the first day of September, 1876, at his (Green's) place, on Deer Creek, in Tulare County, at which time he had a conversation with him, and that Maher then told him (Green) that he (Maher) had sold the sheep belonging to himself and brother to the Kerricks; that he (Green) was on the 29th of August, 1876, in company with one McDonald in going to Visalia, when McDonald said to him (Green) that "there was the Maher boys" (meaning Michael and James Maher); and that defendant Green asked McDonald "which one was Jim Maher" (meaning James Maher), and that McDonald replied "that the largest one was Jim Maher."

Upon the trial of this action the prosecution introduced, among other evidence, the reporter's notes of the testimony of Green, given on the trial of *The People* vs. *Kerrick*. The jury found that the testimony he there gave was false, and rendered a verdict of guilty. It is claimed here, on behalf of the prisoner, that the testimony so given by him was not material to the issues in the prosecution against Kerrick; and this point is the only ground of the present appeal.

We think the point not well taken. The indictment against Kerrick, as has been observed, charged him with having murdered Michael Maher on or about the 20th of August, 1876. In that prosecution it was of course essential for the people to prove that Michael Maher was in fact dead, and that he came to his death by means of some act of Kerrick. In order to controvert the charges in the indictment, Green went upon the stand and testified in Kerrick's behalf to the effect that *subsequent* to the alleged murder—to-wit, on the 29th or 30th of August—he saw James Maher at his (Green's) house, and also saw him about the same time herding sheep in the vicinity of Tipton; and he further testified as follows: "The 29th or 30th of August was the last time I saw James Maher until I saw him at my place on the 29th of August. I was coming to Visalia to work, and McDonald with me. He

says, 'That's the Maher boys.' Says I, 'Which is the one they call Jim?' He says, 'The largest one.'"

If by this is meant that the witness saw Michael Maher on the 29th or 30th of August with his brother James, the materiality of the testimony cannot be questioned. For if it was true that Michael was seen alive after the alleged murder, such fact would of course have been an answer to the charge. But if by the testimony quoted, and other testimony of a similar character, the witness did not intend to say that he saw Michael Maher after the alleged murder, still he did distinctly and positively swear that he saw *James* Maher on Deer Creek on the 29th or 30th of August, and about the same time saw him herding sheep in the vicinity of Tipton. If true, this, in view of the facts appearing in the record, would have been a circumstance more or less potent, tending to show that the theory of the prosecution as to Michael's murder was not correct. In either view, we think the testimony given by defendant on the trial of *The People* vs. *Kerrick* was material to the charge then under consideration, and that the verdict and judgment of conviction should not be disturbed here.

Judgment and order affirmed.

DEPARTMENT NO. 1.

[Filed March 3, 1880.]

[No. 6961.]

WINDER vs. HENDRICK.

DISMISSAL OF APPEAL—CLERK'S CERTIFICATE. Upon a motion to dismiss an appeal for failure to serve and file the printed transcript within the prescribed time, the respondent must present the certificate of the Clerk required by Rule 4 of the Supreme Court.

TRANSCRIPT—CERTIFICATE AS TO UNDERTAKING. The Clerk's certificate must show that the undertaking on appeal was "in due form," and that it was "properly filed."

SAME. Where the Clerk is in doubt whether the form is correct, he should certify the undertaking as it is. Where there is no certificate that it is in due form, the Court will assume it was not in due form.

Appeal from the Superior Court, San Diego County.

Motion to dismiss appeal from judgment.

Lynch & Parker, for appellant.

J. H. Gatewood, for respondent.

By the Court, MCKINSTRY, J.:

1. The respondent claims that the appeal should be dismissed, because of the failure of appellant to serve and file

the printed transcript within the period fixed by the rules of this Court. The time within which the transcript must be served and filed, the penalty for failure to serve and file within such time, and the evidence upon which this Court will enforce the penalty, are all regulated by rules of Court. The *second rule* requires that the appellant shall file and serve his printed transcript within *forty days* after the appeal is perfected; the *third* provides that if the transcript be not filed within the time prescribed, the appeal may be *dismissed*. The *fourth rule* is as follows:

"On a motion to dismiss an appeal, for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the Clerk below, under the seal of the Court, certifying the amount or character of the judgment or order appealed from; the date of its rendition; the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of filing the undertaking on appeal, and that the same is in due form; the fact and time of the settlement of the bill of exceptions and the statement on appeal, if there be any; and also that the appellant has received a duly certified transcript, or that he has not requested the Clerk to certify to a correct transcript of the record, or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded." * * *

In the case before us, respondent has not presented the certificate of the Superior Clerk, made necessary by Rule 4.

2. But we think the certificate of the Clerk to the printed matter, asserted to be a transcript of the record, does not comply with the 953d section of the Code of Civil Procedure. Section 953 reads:

"The copies provided for in the last three sections must be certified to be correct by the Clerk or the attorneys, and must be accompanied with a certificate of the Clerk or attorneys that an undertaking on appeal, in due form, has been properly filed, or a stipulation of the parties waiving an undertaking."

And the Clerk's certificate:

"STATE OF CALIFORNIA, } ss.
' County of San Diego, }

"I, S. Statler, County Clerk and *ex officio* Clerk of the Superior Court of San Diego County, State of California, hereby certify that the foregoing is a full, true, and correct transcript of the 'Judgment Roll' in the case of *W. A. Winder*

vs. *E. W. Hendrick* (executor of the estate of Myron W. Howe, deceased), and embraces the following papers, to-wit: Complaint, Motion to Strike Out, Demurrer to Complaint, Proceedings of Court, Answer, Verdict, Judgment, and Notice of Appeal.

"I further certify that an 'Undertaking on Appeal' was properly filed in my office on the 9th day of December, 1879, in said cause; that said transcript is made out under the direction of plaintiff upon appeal, as the same appears on record, or on file in my office as Clerk of said Court.

"In witness whereof, I have hereunto set my hand and the seal of said Court this 10th day of January, A. D. 1880.

"[Seal.] S. STATLER, Clerk."

The certificate contains no statement or recital that an undertaking on appeal "in due form" has been properly filed. That the expression "properly filed" is not the equivalent of, and was not intended to include, "in due form," is apparent from the wording of the section itself, which requires the Clerk to certify to two distinct and separate facts—to-wit, that the undertaking is *in due form* and that it has been *properly filed.* It needs no argument to establish that a paper writing in form not regular may be "properly filed," or that one in due form may (reference being had to the time of filing, or the officer with whom filed, or other circumstance) be *improperly* filed. In *People* vs. *Center* (No. 6979) we held that, with respect to all matters connected with our appellate jurisdiction, this Court must treat the clerks of the Superior Courts as under our direction and control.

If therefore the undertaking on appeal was, in the opinion of appellant, in due form, he could have moved this Court that the Clerk below be directed to make his *certificate* accord with the fact. If, upon such direction, the Clerk entertained doubts as to the *form* of the undertaking, it would have been a sufficient compliance on his part with our order to certify up a transcript of the undertaking, such as it was.

In the absence of any certificate by the Clerk that the undertaking is "in due form," or of any copy of the undertaking certified by that officer, we must assume the instrument on file below *not* to be in due form. Neither the *affidavit* of the appellant nor that of the Clerk himself can be substituted for the certificate required by section 953 of the Code of Civil Procedure.

The appeal is dismissed without prejudice to another appeal.

DEPARTMENT NO. 1.

[Filed February 23, 1880.]

[No. 5971.]

RICHARDSON vs. MUSSER ET ALS.

JURISDICTION OF PROBATE COURT—NOTICE OF HEARING—MISTAKE IN STIPULATION—SURPRISE. Considered.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco.

Geo. W. Tyler, for appellant.

A. M. Crane and *H. H. Haight*, for respondent.

By the Court, MCKINSTRY, J.:

Complaint by plaintiff, claiming to be the owner, to recover possession of certain real estate held adversely by defendants. Answer, general denial; that the action is barred by the provisions of certain sections of the Code of Civil Procedure; and by some of defendants, an admission that they are severally in possession of designated portions of the demanded premises, and a disclaimer as to the rest.

1. The petition of the administrator of the estate of Ann Dubois, deceased, of the 21st of November, 1859, was sufficient to give the Probate Court jurisdiction to make the order of sale of the real estate. The petition contains every averment made necessary by the statute then in force. (Section 155, Probate Act of 1851, statutes 1851, p. 448.)

2. Nor as the law then stood was it requisite that the attorney appointed to represent the minor heirs should have ten days' notice of the hearing of the petition. (See Probate Act of 1851, sec. 159, as the same read prior to the amendment of 1861.)

3. The District Court committed no error in relieving defendants of the stipulation which had been entered into by counsel. It clearly appeared that it was signed inadvertently and under a mistake in respect to a fact of which plaintiff must be presumed to have had knowledge—to-wit, the plaintiff's age—and that counsel for defendants were misled to consent that plaintiff's age was nineteen years (when in fact it was twenty-eight or thirty) by representations which, however innocently made, were both erroneous and such as counsel for defendants could rely upon without any suspicion of negligence on their part. There can be no doubt of the *power* of the trial court to relieve a party from the effects of a stipulation which admits as a fact that which is not true, if the application is made in proper time.

4. There was no motion for a new trial on the ground of "surprise." If there had been, there is nothing in the transcript to indicate but that plaintiff had ample opportunity to prove her age to be less than claimed by defendants on the motion to set aside the stipulation, if she had desired to do so. On the hearing of the motion to set aside the stipulation, there was no dispute that she was of about the age alleged by defendants.

Judgment and order affirmed.

DEPARTMENT NO. 2.

[Filed March 4, 1880.]

[No. 6664.]

COHEN vs. GRAY.

Costs. Where it appears that a party to an appeal may be entitled to costs of which a dismissal would deprive him, the appeal will not be dismissed.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco.

John Ellsworth, for appellant.

Lake & McKoon, for respondent.

BY THE COURT:

The appellants were trustees of the town of Alameda, and were attempting, in their official capacity, to open a public street through the lands of respondent, when he obtained an order for them to show cause why an injunction should not issue to restrain them from further proceeding in the matter, and that in the meantime they be restrained from proceeding therein. Upon the hearing of said order to show cause, the Court made an order that a writ of injunction issue according to the prayer of the complaint. No writ ever did issue, but the defendants appealed to this Court from the order allowing the injunction. The respondent now moves to dismiss the appeal on the grounds that the term for which the defendants held office has expired, and that the act of the Legislature under which they were proceeding to do the act complained of has been repealed.

We do not think that these constitute sufficient grounds for dismissing an appeal. It may be that appellants will be entitled to costs, if it is finally determined that the order was improperly made, which they may not be able to recover if the appeal should be dismissed. Motion denied.

DEPARTMENT No. 2.

[Filed March 1, 1880.]

[No. 6148.]

COLLINS vs. SULLIVAN.

CLOUD ON TITLE CAUSED BY LAWSUIT. There is no rule by which the value of real estate as affected by a lawsuit may be proven.

Appeal from the District Court of the Twelfth Judicial District, San Francisco.

L. Quint and *E. C. Marshall*, for appellant.

John M. Burnett and *S. M. Wilson*, for repondent.

By the Court, MYRICK, J.:

This is an action to set aside a deed executed by plaintiff to defendant. Thomas Collins died leaving real estate to the value of about $8,000. A paper purporting to be the will of deceased was offered for probate. By the terms of the will, the property was devised to defendant, who was named executor. Plaintiff was the father and only heir of deceased. There was a contest in the Probate Court as to the validity of the will made by a nephew. The jury failed to agree. Thereupon defendant sent his son to Ireland, the residence of plaintiff, and obtained from him a deed of the real estate, paying him therefor $500; and this suit is to set aside that deed. Evidence was offered upon both sides as to what transpired relating to the execution of the deed. The Court found that the deed was not obtained by fraud or any false or fraudulent misrepresentations whatever, or undue influence. Not only are we concluded by that finding in this case, there being a substantial conflict in the evidence, but we are of opinion that the evidence sustains the finding.

Plaintiff on the trial offered to prove by jurors that on the trial in the Probate Court, upon the first ballot, nine of the jurors were against the validity of the will and three in favor; and on a subsequent ballot eleven were against and one in favor—not for the purpose of affecting the proposed will, but for the purpose of enabling the Court to arrive at the probable value of the property "with what might be a cloud on the title." Plaintiff also offered to prove by several witnesses dealing in real estate that they knew Thomas Collins in his lifetime; knew the property and the contest, and what they would be willing to pay for the property "with the will as a cloud upon it." This testimony was objected to, and the objections sustained.

We do not see how any of this testimony was admissible.

It is quite immaterial in this case how the jury stood in the Probate Court. On the next trial they may all be for the will or against it, as the proofs shall be made.

The jurors were not called to testify as to the facts, but as to their deductions from the testimony given; and their opinions were entitled to no more weight than those of any other twelve persons of equal intelligence. We do not know of any rule by which the value of real estate, as affected by a lawsuit, may be proven. The law knows of no such experts. Such testimony can be nothing more than mere guess. We see no error in the record.

Defendant had judgment in the Court below; plaintiff moved for a new trial, which was denied, and plaintiff appealed.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed February 20, 1880.]

[No. 5895.]

MARY A. O'NEIL vs. CHARLES P. O'NEIL AND RICHARD O'NEIL.

CHANGE OF VENUE. If, in an action against two defendants for determining a right to real estate situated in a different county, or in different counties from that in which the action was commenced, one of the defendants waive his right to a change of venue and the other does not, the latter is entitled, upon a proper showing, to a change to the proper county.

Appeal from the District Court of the Twelfth Judicial District, San Francisco.

J. E. McGrath, for appellant.

Geo. Cadwalder, for respondent.

By the Court, McKEE, J.:

The action in this case was commenced in the Nineteenth District Court of the city and county of San Francisco against two defendants, for the purpose of having determined a right claimed by the plaintiff to certain real estate situated partly in Sacramento County and partly in Sutter County. The case is therefore one of the class of cases mentioned in section 392 of the Code of Civil Procedure. Service of summons was had upon one of the defendants, who appeared and answered the complaint. Ten months afterward, service was

had upon the other defendant, who appeared and moved for a change of place of trial of the action to Sacramento County. The Court denied the motion upon the ground that it was necessary for all the defendants to join in the motion, and that is the question.

There are decisions of the Supreme Court of New York which sustain the ruling of the Court below; but those were rendered upon a particular statute or rule of the courts of that State. By the practice of the Court, says Chief Justice Bronson, a motion to change the venue can only be made by all the defendants, unless a good reason is shown for their not joining in the motion. (*Welling* vs. *Sweet*, 1 How. Pr. 156; *Sailly* vs. *Hutton*, 6 Wend. 508; *Fickens* vs. *Jones*, October Term, 1863, unreported.) If that rule were the law of such an application in this State, it would seem as if the application under consideration would fall within the exception of the rule; for it was legally impossible for the defendant who made the application to join with him his co-defendant, because the latter had, by answering, waived his right to a change of venue; and having waived it, he had no longer any interest in the matter.

But the subject of venue in this State is regulated by Title IV of the Code of Civil Procedure. Under the provisions of that title, a defendant to such an action as the one under consideration is entitled, as a matter of right, to have the action tried in the county where the land is situated. There is nothing in the provisions which require all the defendants to join in claiming such a right. It is a right which belongs to each defendant; and although it is not a vested right—because the regulations upon the subject relate only to the remedy—yet it is one which every defendant can exercise for himself so long as the remedy exists, and until he loses it by his own involuntary act. Each defendant may waive it for himself, but the waiver of one cannot be used to prejudice or destroy the right of another.

When, therefore, in an action against two defendants for determining a right to real estate situated in a different county or in different counties from that in which the action has been commenced, one of the defendants waives his right to a change of venue and the other does not, the latter is entitled, upon a proper showing, to a change to the proper county. And it is the duty of the Court to grant his application; for transferring the action to the proper county for trial is only doing what plaintiff herself should have done when she commenced the action.

Order reversed, and cause remanded.

DEPARTMENT NO. 1.

[Filed February 27, 1880.]

[No. 6231.]

IN THE MATTER OF THE ESTATE OF HENRY B. COTTER, DECEASED.

RIGHT OF NON-RESIDENT TO NOMINATE ADMINISTRATOR. Section 1369 of the Code of Civil Procedure, which prohibits a non-resident from serving as administrator, does not abridge or conflict with section 1365, which permits a surviving husband or wife to nominate an administrator.

Appeal from the Probate Court of the city and county of San Francisco.

R. H. Lloyd, for appellant.

E. J. and *J. H. Moore*, for respondent.

By the Court, Ross, J.:

Both parties to the controversy claim the right to administer the estate of Henry B. Cotter, deceased. Which has the better right is the question to be determined.

Cotter died intestate in the State of Missouri on the 4th of April, 1878, being at the time of his death a resident of that State, and leaving surviving him a wife and two minor children, his sole heirs at law. He left in the city and county of San Francisco, State of California, fourteen thousand dollars worth of personal property. On the 20th day of May, 1878, the widow filed in the Probate Court of the city and county of San Francisco a renunciation of her right to administer upon the estate, together with a request that letters of administration thereon be granted to one Thomas Crane, a resident of San Francisco, and a competent person. Thereupon, and on the same day, Crane petitioned the Probate Court for letters, to which petition Doolan, the Public Administrator of the city and county of San Francisco, filed objections. On the 3d day of June, 1878, Doolan filed a petition, praying the issuance of letters of administration of the estate to him, claiming that, as Public Administrator, he was of right entitled thereto. Both petitions were heard together on the 9th day of July, 1878; and the facts above mentioned being made to appear, the Probate Court made an order overruling the objections and denying the petition of Doolan, and granting letters of administration to Crane. From this order the Public Administrator appeals.

We shall assume, as most favorable to appellant, that the rights of the parties must be determined by the law as it

stood at the time the order was made, and not when the proceedings were inaugurated. At that time the amendment to sections 1365 and 1369 of the Code of Civil Procedure, which were adopted on the 1st of April, 1878, had gone into effect. Those sections then read as follows:

"Section 1365. Administration of the estate of a person dying intestate must be granted to some one or more of the persons hereinafter mentioned; the relatives of the deceased being entitled to administer only when they are entitled to succeed to his personal estate, or some portion thereof; and they are respectively entitled thereto in the following order: 1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. 2. The children. 3. The father or mother. 4. The brothers. 5. The sisters. 6. The grandchildren. 7. The next of kin entitled to share in the distribution of the estate. 8. The Public Administrator. 9. The creditors. 10. Any person legally competent."

"Section 1369. No person is competent or entitled to serve as administrator or administratrix who is: 1. Under the age of majority. 2. Not a *bona fide* resident of the State." * *

The foregoing are the sections of the Code that bear upon the question.

It is claimed on behalf of the appellant that, inasmuch as the widow of the deceased was incompetent to serve as administratrix by reason of her non-residence, it follows that she had no right to request the appointment of another, and that her nomination in that behalf was of no consequence. The error of appellant comes from supposing that the right of the widow to nominate is derived from section 1379 of the Code of Civil Procedure. If that was true, his conclusion might, and probably would, be correct. But by section 1365, above quoted, the first right to administer is expressly given to "the surviving husband and wife, *or some competent person whom he or she may request to have appointed.*"

This provision is so far modified by section 1369 as to prevent any one from serving who is a non-resident of the State; and where, as in the present case, the surviving wife is a non-resident, she cannot serve as administratrix. But the fact that, by reason of her non-residence, she cannot herself act in that capacity, does not deprive her of the right to name some one who can. Of course the person suggested by her must be competent to serve, and the question of competency is a matter for the Probate Court to determine. But if found competent, it is the duty of that Court to appoint the one whose appointment is so requested. The statute does

not make the right of the surviving husband and wife to nominate depend upon the matter of residence, and there would be no reason in such requirement. There may be, and doubtless are, however, very good reasons for that provision which declares that no person *shall* serve as administrator or administratrix who is not a *bona fide* resident of the State; but this inhibition, and the reason for it, only goes to the right of the non-resident surviving husband or wife to *serve* in that capacity, and does not abridge or conflict with the right expressly conferred by section 1365 upon the "competent person whom he or she may request to have appointed."

The *Estate of Morgan*, 53 Cal. 243, depended upon other provisions of the statute than those considered here. That case does not aid appellant.

Order affirmed.

DEPARTMENT No. 1.

[Filed March 6, 1880.]

[No. 6917.]

M. C. BATEMAN, PETITIONER,

vs.

THE SUPERIOR COURT, ETC., RESPONDENT.

RECEIVER IN EJECTMENT. Under the Code a receiver cannot be appointed in an action of ejectment.

Certiorari to the District Court of the Twenty-third Judicial District.

M. Mulany, for petitioner.

A. N. Drown, *contra*.

By the Court, MCKINSTRY, J.:

An action in form—that which has in this State been usually styled "Ejectment"—was brought in the late District Court of the Twenty-third Judical District by the "Savings and Loan Society," a corporation, against the present petitioner and others. Plaintiff therein alleged that it was, and at all times since a certain date had been, the owner, seized in fee, and entitled to the immediate and exclusive possession of the demanded premises, and that the defendants therein had been in possession of the same from a date included in the period of the alleged ownership of the plaintiff, and since such date had wrongfully and unlawfully withheld, etc. Further, that the rents, issues, and profits of the demanded premises, while plaintiff had been wrongfully excluded there-

from, was the sum of $250 for each and every month. The prayer was for the recovery of the possession of the real property, for the sum of $5,000 "damages for the withholding thereof," and for the value of the "rents, issues, and profits," and costs.

The answer in the action of ejectment was a general and specific denial of all the averments of the complaint, and an allegation that the defendant Bateman was the owner. This last added no force to the denial of plaintiff's right.

After the issues were made up in the District Court (the action has not yet been tried), that Court made an order of which the following is the material portion:

(Title of the action.)

"On reading the pleadings in said cause, and on filing the affidavit of Cyrus W. Carmany, the cashier of the plaintiff, * * * and on motion of A. N. Drown, attorney for plaintiff, the said plaintiff having made and filed a bond, * * * it is ordered that the defendant, M. C. Bateman, show cause before the Judge of this Court at his chambers * * * why a receiver should not be appointed *to take the charge, management, and control of the real property* described in plaintiff's complaint, *and the proceeds thereof* during the pendency of said action, *with power to lease said real property, collect the rents thereof*, and apply the same, as far as shall be necessary, to the payment of *taxes, assessments, insurance, and charges on said real property*, and to protect the same against loss and waste," etc.

On the return day mentioned in the foregoing order to show cause, the District Court, after hearing the parties, appointed Therence Landry "receiver," with powers and duties set forth in the order.

Upon affidavit of petitioner—defendant in the ejectment—a writ of *certiorari* was issued by this to the Superior Court (successor to the said Twenty-third District Court); and now the record and proceeding having been returned, the only question which we can consider is, whether the District Court regularly pursued its authority in making the order appointing the receiver; or, in other words, whether in the action there pending, and upon the pleadings and affidavits, that Court had *power* to appoint a receiver. (C. C. P., section 1074.)

The cases in which a receiver may be appointed are enumerated in section 564 of the Code of Civil Procedure, which reads as follows:

"A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

"1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured.

"2. In an action by a mortgagee for the foreclosure of his mortgage and the sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

"3. After judgment, to carry the judgment into effect.

"4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

"5. In cases where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

"6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

It may be admitted that, prior to the Codes, a receiver could have been appointed before judgment in an action at law to recover the possession of real property. The 143d section of the Practice Act of 1851, as amended in 1854, very clearly authorized such appointment. That section provided:

"A receiver may be appointed by the court in which the action is pending, or by a judge thereof—(1) Before judgment, provisionally on the application of either party when he establishes a *prima facie* right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property, or its rents and profits, are in danger of being lost or materially injured or impaired; (2) After judgment to dispose of the property according to the judgment, or to preserve it during the pending of an appeal; and (3) In such other cases as are in accordance with the practice of courts of equity jurisdiction." (Statute 1854, p. 61.)

While the former Practice Act continued in operation, a receiver could not have been appointed *in actions at law*, except in the cases provided for in the first and second sub-

divisions of section 143 (although those subdivisions may also have included suits in equity), and it cannot be doubted that the third subdivision either *conferred* or *recognized* the further power of appointment in all other cases in which it had been the usage of the Court of Chancery to appoint such officers.

The 564th section of the Code of Civil Procedure authorizes the appointment in certain cases *after judgment*, whether the suit be at law or in equity. It also specifies certain classes of "actions" in which receivers may be named *before* judgment, neither of which includes the present action. The fifth subdivision relates to a class of actions of which the one before us is confessedly not one.

We think the *sixth* subdivision of section 564 of the Code of Civil Procedure was but declaratory of the equity jurisdiction conferred upon the District Courts by the former Constitution, and was intended to include all cases not previously enumerated in which a court of equity would have appointed a receiver. If the sixth subdivision had been omitted from the section, the District Courts would have had power to appoint receivers in "cases where receivers had theretofore been appointed by the usages of courts of equity," because by Article VI, section 6, of the late Constitution, the District Court had jurisdiction in "all cases of equity." This power was recognized in *La Societe Francaise, etc.*, vs. *The District Court*, 53 Cal. 495. Throughout the opinion in that case it is assumed that the sixth subdivision of section 564 of the Code was intended to include only the suits in which, upon the pleadings, or upon appropriate showing by affidavit or other proofs, it had been the usage of courts of equity to appoint a receiver. If it had been intended to confer the power to appoint an officer of that character in an action at law for the recovery of the possession of real property, it is not credible that the Legislature would not have said so in terms, since it is apparent that it was their purpose to specify all cases, whether at law or equity, in which receivers could be appointed. The five subdivisions containing such specifications are followed by the *sixth*, which provides for the appointment where "receivers have heretofore been appointed by the usages of courts of equity," which expression we conceive to be the equivalent of that employed in the third subdivision of the 143d section of the former Practice Act—"such cases as are in accordance with the practice of courts of equity jurisdiction." Either of these expressions simply means that, in addition to the particular instances mentioned in the preceding subdivisions, the

appointment should be made by the District Court, as a court of equity, in the other suits in which the power would have been employed had there been no statute on the subject, and cannot be construed as authorizing the appointment in an action at law.

We are of opinion that, in making the order appointing a receiver, the District Court exceeded its jurisdiction, and that the order should be annulled. So ordered.

DEPARTMENT NO. 2.

[Filed March 5, 1880.]

[No. 6398.]

DOUGHERTY vs. HARRISON ET AL.

STREET WORK IN SAN FRANCISCO—BAR TO PROCEEDINGS. Written objections filed by the owners of more than half the frontage of lots fronting on proposed street grading are a bar to further proceedings in relation to the work, unless it appear that the bar has been removed by petition or otherwise.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco.

H. F. Crane and *J. C. Bates*, for appellant.

E. B. & J. W. Mastick, and *E. F. Preston*, for respondent.

By the Court, THORNTON, P. J.:

There is but one question in this case. Within the proper time after the resolution of intention was passed (which was for grading a street in the city of San Francisco), the owners of more than one-half in frontage of the lots fronting on the proposed work delivered to the clerk of the Board of Supervisors written objections to grading the street. The Board disregarded these objections and proceeded with the work.

The first section of the Act of 1863 (see Acts of 1863, pp. 525–6), under which the proceedings in this case were had, amending section 4 of a former act, provides: "That the owners of more than one-half in frontage of the lots and lands fronting on the work proposed to be done, etc., may make written objections to grading, etc.; such objections shall be delivered to the clerk of said Board of Supervisors, who shall endorse thereon the date of reception by him; and such objections so endorsed shall be a bar to any further proceedings in relation to said grading for a period of six

months, unless the owners aforesaid shall sooner petition for said grading to be done; provided, that when one-half or more of the grading of any street lying between two main street crossings has been already performed, the Board of Supervisors may order the remainder of such grading to be done, notwithstanding the objections of any property owners."

In this case the six months had not elapsed. The Board of Supervisors passed the resolution of intention on the 28th of February, 1870; the objections of the property owners above referred to were received and endorsed on the 4th of March, 1870; and ten days afterwards, on the 14th of the month last named, the Board, by resolution, ordered the clerk to advertise for sealed proposals to perform the work of grading. The property owners had not, after filing objections, petitioned that the work of grading should be done.

It does not appear that the condition of matters mentioned in the proviso quoted above existed; but it is contended that it should be presumed that it did exist, inasmuch as the Board went on to have the work done, notwithstanding the objections of the property owners on file. But we cannot so hold in opposition to the strong language of the provisions of the act of the Legislature cited, that such objections of the property owners as were delivered, endorsed, and filed in this case should be a bar to further proceedings in relation to the grading for six months. In our opinion this bar must be held to exist, unless it should appear by some evidence that the bar had been removed, either by a petition of the property owners or by the existence of a state of things expressed in the proviso. The protest or written objections of the property owners, introduced in evidence, displaced the *prima facie* proof of regularity made by the warrant, assessment, and diagram introduced by plaintiff, and threw upon him (the plaintiff) the burden of showing that the bar effected by the objections on file had been removed. The bar existing, the proceedings subsequent thereto were irregular and illegal.

We do not consider that any question arises herein on the proceedings commenced in 1869, inasmuch as in our opinion those proceedings were abandoned, and a new work commenced under the resolution of intention referred to herein, adopted on the 28th of February, 1870.

The motion for a new trial was properly denied, and the order denying it is affirmed.

DEPARTMENT NO. 2.

[Filed March 3, 1880.]
[No. 5931.]

KELLY vs. McKIBBEN.

DAMAGES IN REPLEVIN. Section 3336 of the Civil Code prescribes the measure of damages for wrongful conversion of personal property, but not for the wrongful detention of property.

Appeal from the District Court of the Fourth Judicial District, San Francisco.

(For the original opinion in this case, see California Reports April 22, 1878.)

Morgan & Sullivan, for appellants.

D. T. Sullivan, for respondents.

By the Court, SHARPSTEIN, J.:

Since the opinion in this case was filed, it has been suggested to us by the counsel for respondent that we must have overlooked or not duly considered section 3336 of the Civil Code, and also *Barrante* vs. *Garratt*, 50 Cal. 112. We certainly did not overlook that section of the Civil Code, but thought then, as we still think, that it was not applicable to this case. This is an action to recover specific personal property. An inspection of the complaint cannot fail to impress that upon the mind of counsel. The plaintiff alleges that the defendant unlawfully took and unlawfully detains the property of the plaintiff, and demands judgment for a return of it. Section 627 of the Code of Civil Procedure specifies what the verdict shall be in such a case; and section 667 of the same Code provides that: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or value thereof, in case a delivery cannot be had, and damages for the detention."

The distinction between this action and one to recover damages for the wrongful conversion of personal property is just as broad as that between the common law actions of *detinue* and *trover*. A good pleader, under the Code, would never confound the two causes of action. One lies for the recovery of the property itself, with damages for the wrongful detention of it; the other for the recovery of damages for the wrongful conversion of it. In the former case the judgment must be for the possession of the property if a delivery can be had, or for the value thereof if a delivery cannot be had, with damages for the detention in either case. If section 3336 of the Civil Code applies to this action, then the plaintiff, in case a delivery of the property *can be*

had, is entitled to recover, in addition thereto, its value at the time of the detention becoming unlawful, with interest from that time, and a fair compensation for the time and money properly expended in the pursuit of the property, because in an action for the recovery of personal property the damages, whether delivery can be had or not, must be "for the detention;" and if that section of the Civil Code supplies the rule for measuring the damages for such detention, the value of the property must be included in any event. If the Legislature intended to provide a rule which should only apply to cases in which a delivery could not be had, it has failed to express that intention. As the provision of the Civil Code now stands, it applies to actions for the recovery of damages for the wrongful conversion of personal property, and not to actions for the recovery of personal property wrongfully detained.

If *Barrante* vs. *Garratt*, *supra*, is correctly reported, our views are not in conflict with the opinion delivered in that case. That action is stated to have been "brought to recover damages for the conversion of the building." That is very different from an action to recover the building itself. We are therefore unable to discover any good reason for modifying our former opinion and judgment.

Motion denied.

Abstract of Recent Decisions.

OREGON SUPREME COURT.

SHERIFF'S MILEAGE. A sheriff is not entitled to mileage in addition to other fees prescribed in section 5 of the Laws of 1874, prescribing the fees of sheriffs for conveying convicts to the State Penitentiary.—*Crossen* vs. *Earhart*, February 24, 1880.

INJUNCTION—FACTS NECESSARY. To warrant the Court in granting an injunction it must appear from the facts stated in the complaint that the plaintiff will suffer irreparable injury unless the defendant be enjoined; and the allegation in the complaint that the plaintiff will be irreparably injured is not sufficient. Facts must be stated, from which the Court may judge of the injury and its extent.—*City of Portland* vs. *Baker*, Feb. 24, 1880.

UNLAWFUL EMPLOYMENT OF LABOR. Where the statute declares that the employment of certain laborers on the public works shall render null and void a contract by a contractor with a municipal corporation, such contract is forfeited by the contractor on the doing the unlawful act, and the corporation may disregard the contract without resorting to a court of equity to annul the contract.—*Id.*

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Current Topics.

THE Supreme Court has adjourned its San Francisco session until July. Next month it will sit at Los Angeles. In the meantime we may expect a large number of opinions in cases already submitted. If we may judge from the wholesale denial of applications for hearing in bank which has just been made, the Court is determined to clear up the calendar of old cases.

WE publish this week an abstract of the late important decisions of the United States Supreme Court in the Virginia and Tennessee cases, where some new principles of Constitutional law were promulgated. Also a fair summary of the able dissenting opinion of Mr. Justice FIELD. These opinions have attracted national attention, receiving on the one hand the hearty commendation of one school of politicians and statesmen, and on the other the emphatic disapprobation of another. Right or wrong, they will constitute an important landmark in the Constitutional history of the nation.

Supreme Court of California.

DEPARTMENT NO. 2.

[Filed March 10, 1880.]

[No. 6380.]

COOK TALCOTT ET AL.

vs.

WILLIAM BLANDING ET AL.

THE BOARD OF HARBOR COMMISSIONERS, by a majority vote, can make a contract or allow a claim.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

Birch & Griffith, for appellant.
J. B. Lamar, for respondent.

By the Court, MORRISON, C. J.:

The facts of this case are, that on the 5th day of March, 1877, plaintiff entered into a contract with the Board of Harbor Commissioners of the State of California (at that time and now composed of the defendants) for the construction of certain slips and the making of certain improvements in and about the harbor of San Francisco. That the contract was duly made and entered into with said board after due proceedings had, the entire board concurring. That said board caused specifications of said work to be prepared, under which said contract was entered into, and caused the same to be advertised and sealed proposals invited. That plaintiffs submitted a bid for said work under and in accordance with said advertisement, and were awarded and received said contract at the price and sum of ninety-six thousand nine hundred and ninety dollars, to be paid to plaintiffs as in said contract specified; the last payment to be made on the completion and acceptance of said slips. That in advertising for bids for the contract aforesaid, a material variance occurred between the advertised estimates and the specifications, which rendered a further outlay for the piles and lumber necessary, and also required a greater amount of labor to be performed than was contemplated; that plaintiffs furnished such additional labor and materials, and performed their contract to the entire satisfaction of the board. That in the proper construction of said slips by

plaintiffs, it was absolutely necessary to furnish and supply extra labor, piles, etc., amounting in the aggregate to the value of $5,722.50, the same being in excess of the labor and material called for in the advertisement for bids, and over and above said contract price. That after the completion and acceptance by the board of said slips, plaintiffs presented to said board a claim for the sum last mentioned, and requested the allowance and payment thereof; that said board found the same to be correct, but declined to pay the same for the reason that the law did not authorize them to make such payment, holding plaintiffs' claim to be an equitable one only. That plaintiffs thereupon made application for relief to the Legislature of the State; and thereafter, on the 8th day of March, 1878, the following act was passed by the said Legislature:

"An Act for the relief of Cook Talcott and Andrew Onderdonk.

"The people of the State of California, represented in the Senate and Assembly, do enact as follows:

"Section 1. The Board of State Harbor Commissioners are authorized to adjust, audit, and pay out of the Harbor Improvement Fund such amount as Cook Talcott and Andrew Onderdonk may be equitably entitled to, for work done and material furnished in the construction of the new slips at the foot of Market Street, in San Francisco, provided the amount does not exceed the sum of $5,722.50."

That on the 15th day of March, 1878, plaintiffs duly presented to the said Board of Harbor Commissioners their claim for said amount, and demanded of said Board to audit, adjust, and pay the plaintiffs, out of the Harbor Improvement Fund, such sum as they were found to be equitably entitled to receive for said extra work and materials; and that thereupon said Board proceeded to adjust and audit said bill, and said Board, by a vote of two to one (said Board consisting of three members), adjusted and audited said bill, and found plaintiffs to be equitably entitled to the full sum of $5,722.50, and by said vote of two to one ordered said bill to be paid. That afterwards—to-wit, on the 15th day of March, 1878—and at other times since then, plaintiffs have demanded of said Board of Harbor Commissioners payment of said claim from the San Francisco Harbor Improvement Fund under their control (there being a sufficient amount of such fund to pay said claim), but payment thereof has been and still is persistently refused by said Board.

The foregoing are substantially the facts set out in plaintiffs' complaint, and on the filing thereof the Court below

granted an alternative writ of mandamus on the 12th day of November, 1878.

On the return day of said writ defendants interposed their demurrer thereto, assigning the usual causes of demurrer specified in section 430 of the Code of Civil Procedure, which demurrer was sustained by the Court below; and thereupon final judgment was entered in favor of the defendants. This appeal is taken from such judgment, and the only question presented is as to the sufficiency of the complaint.

It is contended on behalf of the respondents that the concurrent action of all three of the Board of Harbor Commissioners was required under the Act of March 8, 1878, to adjust, audit, and allow plaintiffs' claim. In support of this proposition, section 2527 of the Political Code is relied upon. That section reads as follows:

"No contract or obligation entered into by the Commismissioners which creates a liability or authorizes the payment of money is valid and of binding force unless the same is signed by all three Commissioners and countersigned by the Secretary of the Board."

But did the action of the Board, in pursuance of the provisions of the Act of March 8, 1878, amount to a contract or the creation of an obligation within the meaning of the Political Code? It will be observed that the contract between the plaintiffs and the Board was regularly entered into, all the forms and requirements of the statute in that behalf having been fully complied with. There was a mutual mistake shown as to the amount of work and the quantity of material required to complete the work; and to provide compensation for the extra work and materials the Act of March 8, 1878, was passed. It was under that special statute that the Board acted, and not under section 2527 of the Political Code. It was the intent of the Legislature, in passing the Act of March 8, 1878, that plaintiffs should be paid out of the Harbor Improvement Fund an amount to which they were equitably entitled; and to that end the Board were authorized to adjust, audit, and pay for such extra work and materials.

It is unnecessary for us to determine whether the Act of March 8, 1878, is mandatory or permissive only. The Board proceeded to act under the authority of the statute, and in our opinion they acted legally and efficaciously. Two of the three members constituting the Board adjusted, audited, and allowed the plaintiffs' claim. This was sufficient under section 15 of the Political Code. "Words giving a joint authority to three or more public officers or other persons are con-

strued as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority."

The authority exercised by the Board in this case was given to them by a special act, and it is nowhere provided in said act that the concurrence of all three of the members of the Board shall be necessary for the proper exercise of such authority. In the case of *People ex rel. Washington* vs. *Nichols*, 52 N. Y. 478, the common-law principle on this subject is stated. In that case the Court had under consideration an act of the Legislature appropriating $20,000, or so much thereof as might be necessary for the purchase of certain relics of George Washington, to be paid only upon the certificate of three persons named therein. *Held*, that a certificate signed by two of the persons named stating that the third met with them but refused to join in the certificate was sufficient. The Court say that the case of *Grindley* vs. *Barker*, 1 Bos & Pul. 229, is in point as to the general rule. Eyre, C. J., then said: "I think it is now pretty well established that where a number of persons are intrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole."

The Court proceed to say: "Then is this a matter of private concern? We are all of opinion it is not. The cases referred to by the respondent cannot fail to establish his doctrine. They hold that arbitrators, to determine controversies between individuals, are engaged in matters of private concern. (*Green* vs. *Miller*, 6 J. R. 39.)"

The same principle was recognized by the Court of King's Bench in the case of *The King* vs. *Beeston*, 3 Term Report 592, which arose under the statute of George I., which enables the churchwardens and overseers to contract for the providing for the poor. It was held that it was not necessary that all the churchwardens and overseers should concur, as the contract of the majority would bind the rest.

But when appraisers act between individuals and the State, it is a matter of "public concern," and a majority act as the whole when all have met. (*Ex parte Rogers*, 7 Cowen, 526.)

The complaint in this case shows that all the members of the Board were present, and we are of the opinion that the action of the majority was sufficient to adjust, audit, and allow plaintiffs' claim, under the Act of March 8, 1878.

Judgment and order reversed and cause remanded, with instructions to the Court below to overrule the demurrer to the complaint.

DEPARTMENT. No. 2.

[Filed March 3, 1880.]

[No. 6372.]

LINEHAN vs. HATHAWAY.

COLLATERAL ATTACK ON JUDGMENT. Where a judgment in partition has been rendered by a Court having jurisdiction of the parties and of the subject matter, it cannot be attacked in a collateral proceeding.

Appeal from the District Court of the Third Judicial District, Alameda County.

Burch & Griffith, for appellant.
Clark & Leviston, for respondent.

By the Court, SHARPSTEIN, J.:

This is an appeal from a judgment of non-suit in an action of ejectment. One of the defenses to the action was that the premises sued for was allotted to the defendant in an action of partition to which the plaintiff was a party, and in which she appeared by an attorney who conducted her defense throughout the entire proceeding. No appeal has ever been taken from the judgment in partition. But it is contended on behalf of appellant that said judgment is absolutely void. We cannot so regard it. The Court had jurisdiction of the parties and of the subject matter of the action; and its judgment, if erroneous, cannot be attacked in a collateral proceeding.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed March 1, 1880.]

[No. 6097.]

HOFF vs. FUNKENSTEIN.

STATUTE OF LIMITATIONS STAYED BY BANKRUPTCY PROCEEDINGS. The running of the statute is suspended in all cases where the plaintiff is denied the right to maintain his suit by section 5106 of the Revised Statutes of the United States because of the pending of proceedings in bankruptcy.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Wilson & Wilson and *E. W. McGraw*, for appellant.
Hunt & Rising, for respondent.

By the Court, MYRICK, J.:

This is an action on two promissory notes for $1,000 each, and for $200 loaned, each item being stated in a separate count. The notes are dated respectively April 1, 1870, and June 22, 1870, payable on demand. September 20, 1870, defendants filed their petition in bankruptcy in due form in the United States District Court, District of California, and were adjudged bankrupts about October 1, 1870. On October 3, 1870, plaintiff made proof of his said debt and claim against the estate of defendants. March 31, 1871, defendants applied to the United States District Court for final discharge as bankrupts. January 17, 1873, the discharge was refused. June 27, 1876, plaintiff commenced this action. Defendants demurred on the sole ground of the Statute of Limitations. The demurrer was sustained; and the plaintiff failing to amend, judgment went for defendants. Plaintiff appealed.

The sole question is whether the time from October 1, 1870, the date of the adjudication, to January 17, 1873, the date of the refusal to discharge, is to be excluded in applying the Statute of Limitations.

Section 356, C. C. P., is as follows: "When the commencement of an action is stayed by an injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

Chapter 5, section 5106, U. S. Revised Statutes, Title LXI, Bankruptcy, provides that "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt; and all proceedings commenced or unsatisfied judgments already obtained therein shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable shall be allowed to prosecute to final judgment any suit," etc.

It is claimed by defendants that it was the duty of plaintiff, if he wished to avoid the running of the Statute of Limitations, to have commenced his suit, and let the defendants, if they wished, plead the bankruptcy proceedings; that he should have applied to the U. S. Court for leave to proceed to judgment, if necessary to ascertain the amount due; and, having omitted so to do, he cannot have any benefit from the pendency of those proceedings.

Section 5106, as above, provides that "no creditor proving his debt or claim shall be allowed to maintain any suit," etc.

Is not the commencement of a suit part of the maintaining it? "Shall be deemed to have *waived all right of action and suit* against the bankrupt." What right had he, then, to commence an action? It is no answer to say that he might have applied to the United States District Court for leave. He might have applied, and that Court, in the exercise of its proper powers, might have denied the application. The theory of our Statute of Limitations is that a creditor has four years (or other time, as the case may be) on any day of which he may, of his own volition, commence an action.

Judgment reversed and cause remanded, with instructions to overrule the demurrer, with leave to defendants to answer.

DEPARTMENT No. 1.

[Filed March 6, 1880.]

[No. 5605.]

BLACK vs. SPRAGUE.

PLAT OF SURVEY. *Serrano* vs. *Rawson*, 47 Cal. 55, affirmed on the point that "in determining the location, the plat of the survey, which is part of the patent, is often entitled to as much, and perhaps to more, weight than the courses and distances."

INCONSISTENT INSTRUCTIONS on a material point make it impossible to determine, after a verdict has been rendered, whether the jury were influenced by the erroneous instruction or not. This is a sufficient reason for reversing the judgment.

ERRONEOUS INSTRUCTIONS as to evidence contained in a map, and as to survey.

Appeal from the District Court of the Third Judicial District, Alameda County.

Moore, Laine & Leib, for appellant.

Wm. Irvine, for respondent.

By the Court, Ross, J.:

This is an action of ejectment for a tract of land situated in Alameda County. It was tried in the Court below with a jury. The plaintiff claimed under a patent of the Mexican grant of the "Rancho El Valle de San Jose," and the defendant under a United States pre-emption patent. The question to be determined by the jury was, whether or not lands patented to defendant were, in whole or in part, within the patent under which plaintiff claimed, and that question turned upon the location of Station 25 of the Spanish grant patent. This patent contained the field notes of the official survey, and also a plat of the survey. The field notes, so far as they bear upon the present controversy, read as follows: "Cor. No. 24; thence north 167.00, leave hills, enter small cañon 173.50 to the edge of the Arroyo Valle; across the

same, course west, 175.00, enter hills 304.00 to a ravine 20 links wide; course west 426.00, leave hills, enter valley 455.50, to the Arroyo Mocho 456.50; across same, course west, 458.75, set a post in the ground at the intersection of the line of the preliminary survey of the Rancho de las Pocitas of Robert Livermore, a post marked V. S. J., No. 25, for cor. No. 25; thence along said line, etc., to cor No. 26." On the plat of the official survey Station 25 was laid down as a stake marked V. S. J., No. 25, *in a stone mound.*

There was no controversy as to the location of Stations 24 and 26.

At the trial several witnesses were examined, who testified to the existence of a stone mound on the ground about 20 chains to the west of a point where Station 25 would be found, if given by course, distance, and the line of the preliminary survey Las Pocitas Rancho alone. And it was shown by the testimony of the witnesses that if the line was run from Station 24 to this stone mound, and from the stone mound to the next fixed station, viz., 26, the lands in controversy would be excluded from the grant; but if run by course and distance, regardless of the stone monument, and so as to strike the preliminary survey line of the Las Pocitas for Station 25, and then run on that line to Station 26, the whole of the disputed premises would be included in the grant.

The plaintiff claimed the true location of Station 25 to be at the point of intersection of the line from Station 24 with the preliminary survey line of the Las Pocitas, but the defendant claimed that the rock mound was its true location.

Lacrose, the United States Deputy Surveyor, who made the official survey of the Rancho "El Valle de San Jose," upon which the patent issued, testified that he had no recollection of erecting a stone monument at Station 25, but thought he had only put a stake there, marked V. S. J., No. 25.

Glaskin, who was one of the chain-men with Lacrose in making the survey, testified that at this station a mound was established by laying three rocks down and putting one up in the middle.

Hawley, another of the chain-men, testified as follows: "At Station 25 I put a stake; there may possibly have been two or three loose stones, but no mound."

One Heiguera testified that he was with Lacrose when he made the survey, and that a stone mound was placed at Station 25, and a stake placed in the same, marked V. S. J., No. 25, which mound, he testified, is still standing at the same place.

E. H. Dyer, a surveyor, testified that he, as United States Deputy Surveyor, made the official survey of Township 3 South, Range 2 East, Mount Diablo Meridian; that he was careful in making his connections with the Rancho "El Valle de San Jose;" that he made a careful examination of its monuments, and found the stone mound referred to by the witnesses near where Station 25 ought to be, as indicated by distance, and with a slight variation as to course; that he satisfied himself that it was the mound referred to in the map attached to the patent of the rancho, and made the survey of the township accordingly, taking said stone mound to be Station 25 of the rancho as patented; and that if the stone mound was the correct location of Station 25, the land in controversy would not be included in the grant. He further testified that he had known the mound for a long time—to-wit, since the year after the official survey of the grant—and that when he first knew it the stake was standing in it, marked V. S. J., No. 25, and that he was confident it was a monument put up by the surveyor in the final survey of the grant "El Valle de San Jose;" that he had often seen the mound, and had made most of the United States surveys in the vicinity of the grant.

Other testimony was given on behalf of the respective parties, but it is unnecessary to go further into its detail. We have already stated enough to show that it was important that the jury, which was called upon to determine whether the land possessed by defendant was within the lines of the plaintiff's patent, should have been clearly and distinctly instructed as to the rules that were to govern them in reaching a conclusion. The testimony in the case was, of course, a matter for them to weigh and consider in the light of the instructions of the Court, and the only ground of complaint here is that the Court erred in its instructions.

The sixth instruction given to the jury was as follows:

"*Sixth.* The controversy is about the correct location of Station 25, as called for by the patent. Station 25 itself is fixed, *according to the patent*, at the *intersection* of a due north and south line from Station 24 to Station 26, *with the line of the preliminary survey* of the Livermore or Pocitas Rancho made by Lewis, and which is in evidence before you. *Then the preliminary line of the Pocitas Rancho* is one of the calls of the patent of the Valle de San Jose Rancho, and *it is a line that cannot be ignored by you.*"

This instruction was clearly erroneous. Since it was not disputed that if Station 25 was, as is here said by the Court, "fixed, according to the patent, at the intersection of a due

north and south line from Station 24 to Station 26, with the line of the preliminary survey of the Livermore or Pocitas Rancho," the land in question would be included in plaintiff's patent. The instruction was in effect telling the jury they should find for the plaintiff, notwithstanding the evidence might have satisfied them, as a fact, that Station 25 was established on the ground at the rock mound referred to on the plat. The instruction entirely ignored the plat, which was an important part of the patent.

In *Serrano* vs. *Rawson*, 47 Cal. 55, it is said: "In determining the location, the plat of the survey (which is a part of the patent) is often entitled to as much and perhaps more weight than the courses and distances." (See also *Vance* vs. *Ford*, 24 Cal. 435.)

According to the plat in this case, Station 25 was fixed at a stake marked V. S. J., No. 25, *in a stone mound*. This was one of the calls of the patent; and if it was true, as some of the testimony at least tended to show, and of which the jurors were the judges, that this station was in fact fixed on the ground at the time the survey was made, at the stone mound spoken of by the witnesses, then it cannot be doubted that the call found upon the plat, and *not* that declared in the instruction under consideration, would be the true call. This instruction was also plainly inconsistent with—indeed, directly opposed to—the eighth instruction, which was given to the jury as follows:

"*Eighth*. The defendants have asked me at this point to say to you that the principal question for you to determine is, the true location of Station 25 at the northeast corner of the grant, as the same was made and established upon the ground by the official survey of said grant. That is the single question for you to determine. If you find that Lacrose, when he ran the line of the rancho upon the ground, used a stone monument at Station 25, and that the line as run by him from Station 24 to 25 terminates in the stone monument, it excludes the land in controversy, and you should find for the defendants."

The conflict between this and the instruction last noticed is obvious. By this, the jury was told that if the surveyor, when he ran the line upon the ground, used a stone monument at Station 25, and that the line as run by him from Station 24 to 25 terminated in the stone monument, they should find for the defendant; whereas by the sixth instruction they were distinctly told that the station in question was "fixed, according to the patent, *at the intersection* of a due north and south line from Station 24 to 26 *with the line of the*

preliminary survey of the Livermore or Pocitas Rancho," which would bring the land within the lines of the plaintiff's patent.

In *Brown* vs. *McAllister*, 39 Cal. 577, the Court, speaking of inconsistent instructions, said: "The two propositions are wholly repugnant, and cannot stand together; and for this reason, if there were no other error in the record, the judgment must be reversed. When the instructions on a material point are contradictory, it is impossible for the jury to decide which should prevail; and it is equally impossible after the verdict to know that the jury was not influenced by that instruction which was erroneous, as the one or the other must necessarily be where the two are repugnant." (See also *Clark* vs. *McElvoy*, 11 Cal. 161; *McCreery* vs. *Everding*, 44 Cal. 246; *Chidester* vs. *Con. P. Ditch Co.*, 53 Cal. 56.)

The Court further instructed the jury as follows:

"*Thirteenth.* Now, the map of the survey upon which the stone monument appears, the defendants ask me to say, is a part of said patent; but the fact that the map describes Station 25 as a stone monument is *no* evidence that there was such a monument in existence, or *established there by the surveyor that ran the lines.*"

As already observed, the map is an important part of the patent, to which, in matters of this sort, great weight is attached. It is the representation of the survey. It is the thing upon which the patent issues, and is put of record for public inspection. When therefore it represents the station in question as being fixed at a stone mound, it cannot be said that such fact furnishes *no* evidence that a mound was established as there represented. And the Court had already told the jury in the sixth instruction that they could not ignore the preliminary line of the Pocitas Rancho; but this call, in this respect at least, had no greater dignity than the call upon the plat; each was a part of the patent.

Other instructions were given to the jury which were objectionable, but one of which we will notice. It reads thus:

"In conclusion, plaintiff asks me to say to you that if you find from the evidence that a survey *could be made* of said rancho, according to the calls of the patent, that will close and embrace the quantity of land called for by the patent, including the land in controversy, you will find for the plaintiff."

It was not disputed that a survey "could be made" of the rancho, according to the courses and distances, that would close and embrace the land in controversy; but the calls of the patent respecting Station 25 were conflicting, and the

very question in the case was, which was the true one—that in the field notes or the one upon the map. By ignoring the latter, the survey could be made according to the former so as to include the land, even though the call upon the plat was in fact correct. We think this instruction was also erroneous.

We are therefore constrained to reverse the order, and to remand the cause for a new trial.

The appeal from the judgment having been taken too late, must be dismissed.

Appeal from judgment dismissed, and order denying new trial reversed, and cause remanded for a new trial.

DEPARTMENT No. 1.

[Filed March 6, 1880.]

[No. 6339.]

JAMES W. WATSON vs. JAMES E. DAMON.

AN INSTRUCTION which does not injure a party cannot be complained of by him, although it be erroneous.

UNCERTAIN VERDICT. Where the verdict was: "We, the jury, find for the plaintiff for the amount of contract, $2,250, with interest at ten per cent. per annum, from August 1, 1876, to November 15, 1877, less the amount of notes of the value of $950, with interest on said notes:" *Held*, that it was not good, because uncertain.

Appeal from the District Court of the Third Judicial District, Alameda County.

E. S. Pillsbury, for appellant.

James H. Smith, for the respondent.

By the Court, MORRISON, C. J.:

The complaint in this case alleges that on the 15th day of March, 1876, the defendant entered into a verbal contract with the plaintiff, by the terms of which plaintiff was to furnish the necessary materials, and to build a dwelling-house for the defendant on a certain lot in the city of Oakland, according to a certain plan and specifications; said house to be completed within sixty days, for the stipulated sum or price of $2,250 in gold coin. Plaintiff avers performance on his part, and claims a balance due him of $1,350.

Defendant denies specifically all the material allegations in the complaint.

Judgment was rendered for the plaintiff; and defendant having moved for a new trial, which was refused, takes this appeal from the judgment, and also from the order denying his motion for the new trial.

The first error relied upon is, that "the instructions of the Court to the jury were contradictory as to a material issue, and were calculated to mislead the jury in their deliberations."

Appellant's counsel has failed to direct the attention of the Court to anything in the instructions which establish the error complained of; and on an examination of the instructions we fail to find any such inconsistency.

The next point is, that "the Court erred in instructing the jury that their verdict should be for a fixed sum, less certain payments, the amount of which was specified by the Court, the jury being the exclusive judges of the facts."

That the facts of the case must be left to the jury, and that the Court cannot interfere with the exclusive prerogative of the jury in passing upon the facts of the case, are familiar principles, well settled by authority in this State; but it will be found on examination of the transcript that there was no conflict in the evidence respecting the cost of the building. The plaintiff testified that it was to cost $2,250, and the defendant, when called as a witness, stated that "he knew the house was to cost $2,250."

In this view of the case, the appellant was not prejudiced by the instruction complained of. (*Terry* vs. *Sickels*, 13 Cal. 427; *Pico et al.* vs. *Stevens*, 18 Cal. 376; *Tompkins* vs. *Mahony*, 32 Cal. 231.)

The last error assigned by appellant is that "the verdict of the jury is defective and insufficient to sustain the judgment."

Defendant in his answer, after denying all the material allegations in the complaint, avers that the plaintiff, on the 17th day of June, 1876, executed and delivered to him (the defendant) his (plaintiff's) promissory note for the sum of $500 as security for a loan of money theretofore made; and on the first day of March, 1877, the plaintiff made and delivered another promissory note to defendant in the sum of $450. The execution of these notes was not denied, but the purpose for which they were given was a matter of contest on the trial, it being claimed by the plaintiff that the sums mentioned in the notes were not loans, but were payments on account of the construction of the building erected by plaintiff on defendant's lot; and we suppose that the jury found that these two sums were payments, and not loans.

The following was the verdict of the jury:

"We, the jury, find for plaintiff for the amount of contract, $2,250, with interest at ten per cent. per annum from August 1, 1876, to November 15, 1877, less the amount of notes of the value of $950, with interest on said notes."

The form of the verdict, in actions of this character, is prescribed by section 626 of the Code of Civil Procedure: "When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, *the jury must also find the amount of the recovery.*"

Is the verdict in this case good under the foregoing section? We are of opinion that it is not, as it fails to find the amount of money due the plaintiff. It is for a certain amount, less $950, with interest, the amount of interest being left indefinite and uncertain; nor is there anything in the pleadings from which the amount of interest can be ascertained.

Judgment and order reversed.

DEPARTMENT No. 2.

[Filed March 5, 1880.]

[No. 6102.]

HASKELL vs. HASKELL.

DIVORCE. Adultery and intemperance are grounds for granting a divorce, but they cannot be shown as evidence of extreme cruelty to support an application for divorce on that ground.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

J. E. McElrath, for appellant.

A. M. Crane, for respondent.

By the Court, SHARPSTEIN, J.:

The plaintiff, for a first cause of action, alleges that the defendant, for more than ten years next preceding the commencement of this action, was guilty of extreme cruelty toward her; and then proceeds to detail at great length a series of acts which, if proved, would support a finding of adultery. Immediately following this narrative in the same count is an allegation "in further support of said charge of extreme cruelty," as the pleader styles it, "that for more than ten years past, and until now, defendant has been addicted to the use of intoxicating drinks," which caused him to be "quarrelous and disagreeable—often using towards plaintiff offensive language in the presence of the children; that his breath became nauseous and offensive; so that for these

reasons, and by reason of his intimacy" with the woman who is alleged to have been his paramour, the plaintiff, with the defendant's consent, ceased to lodge with him in 1871. It is further alleged in this connection that during said ten years the defendant often appeared before the plaintiff and her children "in a state of intoxication; and many times, when he was very drunk, so much so as to hardly know what he was about;" and that this occasioned the plaintiff "great mental suffering." These alone are the facts alleged in support of the charge of extreme cruelty.

That adultery or habitual intemperance would, in a popular sense, constitute extreme cruelty, we do not question; and so would wilful desertion or willful neglect. But in a legal sense extreme cruelty is something different from any of the other causes of divorce, and constitutes a separate and distinct cause of action. Otherwise it would be unnecessary to specify any other cause than extreme cruelty as a ground of divorce in any case. This count seems to be framed on the theory that allegations of adulterous conduct which fall short of actual adultery, coupled with allegations of excessive drinking, which does not amount to habitual intemperance, constitute a good cause of action for extreme cruelty. That theory is not supported by any authority, and we are not inclined to lend it our countenance.

On the trial, the plaintiff, by leave of the Court, withdrew the charges of intimacy or association of the defendant with the woman named in the first count of the complaint; and it was suggested on the argument by respondent's counsel in this Court, that the remaining allegations of that count constitute a cause of action for divorce on the ground of habitual intemperance. But the complaint was not drawn with that view. The allegations of the same count as to intemperance are avowedly and expressly introduced "in further support of said charge of extreme cruelty," which is alleged to have occasioned the plaintiff "great mental suffering," and not such as "would reasonably inflict a course of great mental anguish" upon her, which is a further indication that the pleader had "extreme cruelty" and not "habitual intemperance" in view. The allegations of this count are denied in the answer, and the Court did not find that the defendant had been guilty of extreme cruelty.

If the count states a cause of action for extreme cruelty, there should have been a finding upon the issue raised by the answer to it. If the cause of action stated in it is not extreme cruelty, then the count is obnoxious to the objection which this Court sustained to a pleading in *McAbee* vs. *Ran-*

dall, 41 Cal. 136. Treating it, then, as the pleader intended it should be understood, as stating facts to constitute a cause of action for extreme cruelty, the judgment, in the absence of a finding of extreme cruelty, cannot be sustained upon that count.

But the pleader undertook to state another and distinct cause of action, and commences his count upon it as follows: "And for further and separate cause of complaint, plaintiff states that for more than two years next preceding the commencement of this action defendant has been, and still is, guilty of and addicted to intemperance," etc. In this count there is no allegation of marriage, or that the plaintiff has resided in the State for the period of six months next preceding the commencement of the action, nor is there any reference in it to the allegations in the first count as to such marriage or residence. If this were the only count in the complaint, the objection that it does not state facts sufficient to constitute a cause of action would undoubtedly be fatal to the judgment. And in Chitty's Pl., 16 Am. ed. 429, it is said: "But unless the second count expressly refers to the first, no defect therein will be aided by the preceding count; for, though both counts are in the same declaration, yet they are for all purposes as distinct as if they were in separate declarations, and consequently they must independently contain all necessary allegations, or the latter count must expressly refer to the former." In *Barlow* vs. *Burns*, 40 Cal. 351, this rule is recognized and approved. And in other States, whose Codes contain the precise provision found in our own, that each cause of action "must be separately stated," it has been held, so far as we have observed, that such count must contain all the facts necessary to constitute a cause of action, and that its defects cannot be supplied from statements outside of it unless expressly referred to in it; and not then, if the matters omitted relate to the *gravamen* of the action. Treating the allegations in the first count as to marriage and residence as mere matters of inducement, they should have been repeated or referred to in the subsequent count, and the omission to either repeat or refer to them is fatal; because without those allegations the complaint fails to state facts sufficient to constitute a cause of action

We are unable to discover any other error in the record. For those above pointed out the judgment must be reversed.

Judgment reversed and cause remanded to the Superior Court for a new trial, with directions to that Court to permit the plaintiff to amend her complaint if she shall be so advised.

Abstract of Recent Decisions.

SUPREME COURT OF THE UNITED STATES.

TRIAL OF FEDERAL OFFICER FOR MURDER. In the case of *Tennessee* vs. *Davis*, which was a case where an internal revenue officer was indicted for murder, he having in self-defense killed a "moonshiner," and having asked to have his case transferred to the Federal Court, the Court lays down some very strong doctrines in favor of national supremacy, showing how State sovereignty might easily nullify the Constitution if carried to its limits. Justices Clifford and Field dissented.

STATE AND FEDERAL COURTS—CONFLICT OF JURISDICTION—TRIAL OF NEGROES. The following is the syllabus of the decision of the Supreme Court of the United States in the two cases decided March 1, 1880, of the negroes named Reynolds, who, being accused of murder in Virginia, were taken by the United States Circuit Court (Judge Rivers) from the State Court, on the ground that they could not receive a fair and impartial trial under the State laws on account of their color. The State Court applied for a mandamus to have them restored to its jurisdiction. Justice Strong, of the Supreme Court, in a long and carefully prepared opinion, holds:

1. That the object of the statutes under which the men were removed to Federal jurisdiction was to give negroes equal civil rights with whites.

2. That the prohibitions of the Fourteenth Amendment do not refer to any actions of individuals.

3. The prohibitions of the Fourteenth Amendment apply equally to all the functions of State government—executive, legislative, and judicial—and Congress may enforce those prohibitions when disregarded by any department of the State, and remove the case to a Federal Court.

4. But the Fourteenth Amendment is broader than the statute 641, which authorizes removal. Removal may be made before trial and final hearing. Section 641 does not apply to judicial infractions after trial. Such infractions are left to the revisory power of this Court.

5. The statute refers to a legislative denial, or inability resulting from it.

6. The Constitution and laws of Virginia do not exclude colored citizens from juries. The petition for removal therefore presents a case for removal under section 641.

7. Defendant in this case moved to have one-third or some portion of the jury of his own race. Denial of that motion was a violation of law providing for equal civil rights of citizens by the Fourteenth Amendment. A mixed jury in a particular case is not essential to equal protection of laws. A colored man has

the right to selection of jurors to pass upon his life, property, or liberty; and the Court should not exclude his race, nor discriminate against him because of color. But that is different from what is claimed—namely, to have a jury composed partly of colored men. Therefore the Federal Court has no rightful jurisdiction of the case, and writ of mandamus or restoration of prisoners to State authorities must be granted.

EXCLUDING NEGROES FROM JURY DUTY. In another case, which was an application for a *habeas corpus* on behalf of Judge Coles, of Virginia, charged with excluding negroes from a jury on account of race and color, the Court decides that the Act of March 4, 1875, is fully authorized by the Constitution. Although defendant was a judicial officer of the State, yet in his ministerial duty of selecting he was bound to discharge his functions in pursuance of the Federal Constitution. Judge Coles' application for a writ of *habeas corpus* and relief by the Court is denied. Judge Strong delivered the opinion; Clifford and Field dissented. The latter maintains, first, that assuming the validity of the Act of March, 1875, the indictment describes no offense under it, but is void on its face; and second, that the act, so far as it relates to jurors in State courts, is unconstitutional and void. He holds that nothing can be found in the Constitution, from its opening to its closing line, nor in any of the amendments in force before the close of the civil war, nor in those subsequently adopted, which authorizes any interference by Congress with the States in the administration of their government and the enforcement of their laws with respect to any matter over which jurisdiction was not surrendered to the United States. Nothing, in his judgment, could have a greater tendency to destroy the independence and autonomy of States, and reduce them to humiliating and degrading dependence on a central government, engender constant irritation, and destroy that domestic tranquillity, which was one of the objects of the Constitution to insure, than the doctrine asserted in this case that Congress can exercise coercitive authority over judicial officers of State laws. It will be only another step in the direction toward consolidation when it assumes to exercise similar coercitive authority over governors and legislatures of States. After giving the history of the Thirteenth and Fourteenth Amendments, Justice Field maintained that, according to his understanding of their purport and meaning, there is no warrant for the act of Congress under which the indictment of Coles was found. The arrest and imprisonment of the petitioner was unlawful, and his release should be ordered. Those who regard the independence of the States in all reserved powers—and this includes independence of their legislative, judicial, and executive departments—essential to the successful maintenance of our form of government, cannot fail to view with gravest apprehension for the future the indictment

in a Court of the United States of a judicial officer of a State for the manner in which he has discharged duties under her laws, and under which she makes no complaint. The proceeding is a gross offense to the State. It is an attack on her sovereignty in matters over which she has never surrendered her jurisdiction. The doctrine which sustains it, carried to its logical results, would degrade and sink her to the level of a mere local municipal corporation; for if Congress can punish an officer of a State for the manner in which he discharges his duties under her laws, it can fix the nature and extent of his punishment. It may imprison for life, or punish by removal from office; and it can make exclusion of persons from jury service on account of race or color a criminal offense. It can make their exclusion from office on that account also criminal; and adopting the doctrine of the District Judge in this case, the failure to appoint them to office will be presumptive evidence of their exclusion. To such a result he thinks the doctrine logically leads. The legislation of Congress was founded and sanctioned by this Court, in his opinion, upon a theory as to what constitutes the equal protection of the laws, which is purely speculative, not warranted by any experience of the country, and not within the understanding of the people as to the meaning of these terms since the organization of the Government.

OREGON SUPREME COURT.

WOOD ON SCHOOL LAND. The purchaser of a tract of school land, having paid one-third part of the purchase money, and received a certificate of purchase under section 10, p. 632, of the Code, afterwards cut and piled up a quantity of cord wood on the land, and then assigned his certificate of purchase, the assignee did not thereby become entitled to the wood by virtue of the assignment of the certificate.—*Schimiett* vs. *Vogt*, February 24, 1880.

SAME. The wood so cut becomes personal property when severed from the realty, and belonged to the purchaser of the land who cut and piled it up; and it did not remain the property of the State until the land was fully paid for.—*Id.*

WAIVER OF DEMAND. F., who was an accommodation indorser, indorsed on the back of a note before due these words: "I hereby waive notice of protest of non-payment." Held not to be a waiver of demand of payment from the maker.—*Sprague* vs. *Fletcher*, February 24, 1880.

STRICT CONSTRUCTION. Agreements of this character to be construed strictly, and not extended beyond the fair import of the terms.—*Id.*

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Current Topics.

WE have received a copy of the able dissenting opinion of Mr. Justice FIELD, in the matter of *Coles* and *Commonwealth of Virginia*, petitioners for writ of *habeas corpus*.

WE call attention to the case of *The California Furniture Co.* vs. *Chas. Halsey*, appearing in this issue. Our Supreme Court decides the much debated question concerning the rights of partnership creditors to pursue firm assets, notwithstanding the individuals of the partnership have filed petitions in insolvency. The Court affirms that right.

JUDGE HOFFMAN, sitting with Judge SAWYER, of the United States Circuit Court for this district, has rendered an opinion holding that the Act of the Legislature of this State, prohibiting the employment of Chinese by corporations, is in violation of the Constitution of the United States, and of an existing treaty between the Government of China and this Government. The opinion, together with the concurring opinion of Judge SAWYER, will be published next week.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed March 13, 1880.]

[No. 6161.]

KNIGHT, APPELLANT, vs. ROCHE, RESPONDENT.

FINDINGS. There must be a finding, when findings are made, upon all the material issues in the case, and they must support the judgment. A judgment for defendant in an action for ejectment must be supported by a finding as to plaintiff's ownership, possession, and ouster.

SALT MARSH AND TIDE LANDS—INVALIDITY OF DEEDS OF TIDE LAND COMMISSIONERS. Lands in the city and county of San Francisco, above the ordinary high water mark, though salt marsh, and not included within the boundaries of the red line as indicated upon the Red Line Map, could not be conveyed by the State Tide Land Commissioners.

EVIDENCE. The judgment roll and Sheriff's return in prior proceeding is inadmissible as evidence against a person not a party to that proceeding.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

B. S. Brooks, for appellant.
D. W. Douthitt, for respondent.

Ross, J., delivered the opinion of the Court:

This is an action of ejectment brought by the plaintiff against James Roche, Henry Conroy, H. S. Slicer, D. W. Douthitt, and two fictitious defendants, to recover a piece of salt marsh land situated within the confirmed limits of the city of San Francisco. The complaint, which is not verified, is in the usual form of such actions, and alleges that on the 1st of April, 1872, plaintiff "was the owner, and seized in fee, and possessed and entitled to the possession" of the demanded premises, and that defendants on that day ousted plaintiff therefrom, etc. The answer contained, first, a general denial, putting in issue all of the allegations of the complaint. In addition, it set up that on the 29th of September, 1871, plaintiff commenced an action in the Fourth District Court against James Roche, Henry Conroy, and D. W. Douthitt to quiet his alleged title to, and to remove a cloud from, a *portion* of the land in controversy in the present action; that issue was joined in that action; a trial had upon the merits, resulting in the entry on the 1st of October, 1873, of a judgment decreeing that plaintiff "was only entitled to the reversionary interest of the State of California, after the expiration of ninety-nine years from the 26th of March, 1851,

to the *following portion of the land described in said action and in this action*" (describing it), and further decreeing "that, as to the remainder of the lands described in the complaint, and as to the other defendants, that the said action be *dismissed*." The answer further set up that, pending the action in the Fourth District Court, Henry Conroy conveyed all his interest in the land then in question to H. S. Slicer, and that "there was no formal substitution of Slicer as a defendant therein, but that the same was defended by Conroy in the interest of Slicer."

The answer further averred that for more than twenty years before the commencement of this action defendants had been in the adverse possession of the premises.

A supplemental answer was filed, in which it was alleged that the plaintiff appealed to this Court from the decree rendered in the Fourth District Court case, and that the decree was, on the 18th of October, 1875, affirmed by the Supreme Court.

The foregoing is the substance of the pleadings in the case, upon which it was tried.

At the trial a good deal of evidence was introduced, upon which the Court made findings, the material portions of which are as follows:

First. That the land in controversy is salt marsh and tide land, and is known and numbered as Potrero Block, No. 169, upon the official survey of the city, as it existed prior to 1866.

Second. "That on the 28th day of August, 1868, and long prior thereto, H. F. Williams and his predecessors were and had been in the actual and peaceable possession of the said block of land, claiming to own the same; and that on the said 28th day of August, 1868, the said Williams by deed duly executed, and for a large consideration sold and conveyed said block of land to defendants James Roche and Henry Conroy, and that they thereupon entered into actual possession thereof; and that they and their grantors have been in the actual possession thereof, except when interrupted by intruders, since that time, and are now in such possession; that about the time above named, R. C. Page, George W. Dent, and Frederick T. Dent conveyed to said Conroy and Roche, and that they claimed some interest in said land."

Third. That on September 30, 1871, the Board of Tide Land Commissioners, as constituted under the Act of April 1, 1870, sold and conveyed the said block of land to Conroy and Roche; and that subsequently, and before the com-

mencement of this action, Conroy and Roche conveyed to Douthitt an undivided third interest in the land, and that on the 8th of November, 1871, Conroy conveyed his interest to Slicer.

Fourth. The fourth finding states the facts respecting the Fourth District Court action of plaintiff vs. Roche and others, mentioned in the answer and supplemental answer.

The fifth and sixth findings are as follows:

"*Fifth.* That in August, 1868, while the defendants Conroy, Roche, and Douthitt were in the actual and peaceable possession of said land under their deed from Williams and others, one C. P. Duane and others unlawfully and forcibly took possession of said premises from said Conroy, Roche, and Douthitt; and thereafter said Knight, the plaintiff herein, forcibly entered upon a portion of the premises, being the same described in the fourth finding, and ejected the said Duane and others from said portion of the premises; that thereupon said Roche, Conroy, and Douthitt, defendants, erected on the block a building, and have been in possession thereof ever since. That in February, 1869, the defendants, Henry Conroy and James Roche, commenced an action of forcibly entry and detainer against said C. P. Duane and others, in the County Court of the city and county of San Francisco, for the purpose of recovering the possession of the said block of land; and such proceedings were had that a trial was had before the Court upon the merits in March, 1869; and that on the 25th day of March, 1869, the said Court rendered judgment for plaintiff and against said defendants. That hereafter said defendants duly appealed said cause to the Supreme Court of the State; and that long before the commencement of this action said judgment was duly affirmed by said Supreme Court; and that long before the commencement of this suit—to-wit, in the year 1873—a writ of possession was duly issued out of said Court in favor of said Conroy and Roche, and upon said judgment, and that they were by the Sheriff of said city and county duly placed in the actual possession of said land as provided by law, and that they and their grantees have been in such possession of all the land in dispute ever since.

Sixth. That said land, except a small portion thereof (as described in the decrees in the case of *Knight* vs. *Haight et al.*, as mentioned in the fourth finding), is above the ordinary high water mark, and that said land (except the portion described in said decree) is not included within the boundaries of the red line, as indicated upon the red line map, as provided for by the Act of March 26, 1851."

Upon these findings judgment was rendered in favor of the defendants.

1. It has been repeatedly held here that when findings are made there must be a finding upon all of the material issues in the cause; and further, that the findings must support the judgment. (*Baggs* vs. *Smith*, 53 Cal. 88; *Shaw* vs. *Wandesforde*, Id. 300; *Taylor* vs. *Reynolds*, Id. 687; *O'Connor* vs. *Frasher*, Id. 435.) Applying these rules to the findings in the present case, their insufficiency becomes manifest. There is no finding one way or the other, as to the plaintiff's alleged ownership or possession of the premises in question, nor as to the alleged ouster. Nor do the probative facts found necessarily determine those issues.

2. Whatever the evidence may show, the *findings* do not establish title in defendants. It does not appear from them that Williams or any of his predecessors, or Page or either of the Dents, ever had any title to or interest in the property. The Court, having found as a fact that the land in controversy, with the exception of a small portion, is *above the ordinary high water mark*, it follows necessarily that the conveyance from the State Tide Land Commissioners conveyed no title to that portion, at least, that is above the ordinary high water mark. (Act of April 1, 1870, Stat. 1869-70, p. 541; *Tripp* vs. *Spring*, 2 Pacific C. Law J. 29.)

3. Assuming that the judgment and the action of *Knight* vs. *Roche et als. may* be a bar to the present action—a point we do not decide—it is clear it cannot be, as it is made to appear in the pleadings and findings. It there appears that the plaintiff in the Fourth District Court action only sued to quiet title to a *portion* of the land involved in the present suit; that, by the judgment, it was decreed that he was "entitled to the reversionary interest of the State of California, after the expiration of ninety-nine years from the 26th of March, 1851," to a *portion* of the premises involved in *that* action; and that "as to the remainder of the lands described in the complaint, and as to the other defendants, that the said action be *dismissed*." If this judgment can be held to be a bar to the present action as to any of the land described in the complaint, it is perfectly plain that it cannot be such a bar to all of it; for it does not appear that the same title was in issue, and it *does* appear that a portion of the land here in question was not embraced in the complaint or decree in the former action.

4. It is difficult to understand why the facts relating to the forcible entry and detainer action of Conroy and Roche against Duane and others were incorporated in the findings,

or upon what principle the judgment roll in that action and the Sheriff's return to the writ of possession thereupon issued were admitted in evidence, since it nowhere appears that the plaintiff was a party to the action or had any connection with it. In our opinion both were inadmissible, and the Court erred in receiving them. The presumption of error that is indulged from their erroneous admission is strengthened by the fact that the Court deemed the matter of sufficient importance to incorporate the facts respecting it in the findings.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed March 4, 1880.]

[No. 6408.]

SULLIVAN vs. HENDRICKSON.

BY THE COURT:

In this case the order of the Court below is reversed and cause remanded, on the authority of the opinion of this Court filed December 31, 1879, in *McCracken* vs. *Harris*.

DEPARTMENT No. 2.

[Filed March 4, 1880.]

[No. 6055.]

JORDON vs. HUBERT, TREASURER.

CITY HALL CONSTRUCTION BONDS. Interest as well as the principal of the warrants for work on the New City Hall, in San Francisco, is payable out of the fund realized from the sale of "City Hall Construction Bonds."

Appeal from the Superior Court of the city and county of San Francisco.

J. M. Nougues, for appellant.

W. C. Burnett, for respondent.

By the Court, SHARPSTEIN, J.:

The plaintiff, under a contract with the Board of City Hall Commissioners of San Francisco, performed certain work upon the New City Hall for which he received, prior to January 24, 1875, five City Hall warrants for various sums, each

of which was registered by the Treasurer of the city and county of San Francisco soon after it was issued. On the 21st of July, 1876, the plaintiff presented said warrants to the defendant, who was then Treasurer of said city and county, and demanded payment of the principal, together with interest thereon from the dates of the registration of said warrants, said interest amounting in the aggregate to $6,330.33. The Treasurer paid the principal, but refused to pay the interest or any part thereof. Upon the plaintiff's application, an alternative writ of mandamus was obtained by him, commanding the defendant to pay said interest, or show cause, etc. The defendant answered, denying in effect that there was any law which made it his duty to pay said interest. After some evidence had been introduced, and the parties rested, the Court found that there was not at the time of the presentation of the warrants, nor has there been since, money in the treasury out of which said interest could be paid, and rendered judgment in favor of the defendant, from which this appeal is taken.

As the principal and interest were both payable out of the same fund, and the defendant testified on the trial that at the time of paying the principal there was $200,985.85 in the fund out of which he paid it, we are forced to the conclusion that if the principal was paid out of the appropriate fund there must have been money in the treasury out of which the interest might have been paid at the same time.

The fund out of which the warrants were paid was supplied by money realized from the sale of "City Hall Construction Bonds," and section 6 of that Act (Statutes 1875–6, p. 864) which authorizes the sale of those bonds, provides that "As soon as any fund arising from the sale of said bonds are in the hands of the said Treasurer, he shall publish a notice thereof for five days in three daily newspapers, printed and published in said city and county, and requiring the holders of said warrants to present them for payment. All said warrants shall cease to bear interest after the expiration of said five days. The said Treasurer shall pay said warrants, *principal and interest*, in the order of their presentation." It appears that the Treasurer published the appropriate notice, and that the plaintiff presented his warrants within the prescribed time for payment of principal and interest due upon them. The Act of April 4, 1870, under which the contract with plaintiff was entered into, provided for the payment of interest in case of deferred payments, as in this case. No question is raised as to the correctness of the computation of interest. Upon the case presented by

the record we are clearly of the opinion that the plaintiff is entitled to the relief which he claims.

Judgment reversed, with directions to the Superior Court of the city and county of San Francisco to enter a judgment in favor of the plaintiff. And as this Court has, upon proper suggestion that the term of office of said defendant, Charles Hubert had expired, and that he had been succeeded in said office by W. R. Shaber, made an order substituting said W. R. Shaber as defendant herein in place of said Charles Hubert, said Superior Court is directed to issue in said action a peremptory writ of mandamus to said W. R. Shaber as Treasurer of said city and county, commanding him to pay to the plainfiff the said sum of $6,330.33, interest due upon said warrants specified in the affidavit and petition of said plaintiff for the issuance of said writ.

DEPARTMENT NO. 2.

[Filed March 13, 1880.]

[No. 6454.]

WHEELER vs. BOLTON.

STATUTE OF LIMITATIONS—Held that a right of action based upon a decree of distribution made by the Probate Court April 17, 1876, was not barred August 6, 1878.

ABSENCE OF CO-EXECUTOR If one of two executors be absent from the State, the other can administer; and his accounts can be settled and a distribution be had without the presence of the other.

JURISDICTION OF PROBATE COURT After a decree of distribution has been made, the Probate Court has no longer a jurisdiction over the property distributed except to compel delivery. The distributor has a right of action to recover under the decree.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

B. S. Brooks, for appellant.

D. Rogers, for respondent.

By the Court, MYRICK, J.:

This is an appeal from a judgment rendered after an order sustaining a demurrer, the plaintiff electing not to amend.

The complaint alleges that one Carmen died testate, devising all the estate to plaintiff; that at the time of his decease he was the owner of, and seized and actually possessed, and in the actual occupancy of, a tract of land described by metes and bounds; that the will of the testator appointed defendant Bolton and one Adams executors; that the will was probated, and both the executors qualified and entered upon the discharge of their duties; that thereafter, in 1855, Adams

departed from this State, and has not since returned; that in 1875 defendant rendered his final account, and the Probate Court, by its decree, adjudged that defendant came into the possession as executor of said real estate, and was chargeable with the possession thereof; that the devisee (plaintiff) was entitled to have and receive said real estate, and that defendant be charged with said premises; that April 17, 1876, the Probate Court made a decree of final distribution, in which decree plaintiff was adjudged to be entitled to the possession of said real estate, and defendant was required to deliver and surrender the possession of the same to plaintiff; that plaintiff has demanded of defendant the possession of the estate, and that defendant has refused and neglected to deliver the possession of the same or any part thereof; that defendant, in violation of his duties as executor, did not safely keep, retain, and protect his possession of said land, but allowed himself to be dispossessed, and the property and title lost to plaintiff; and plaintiff demands judgment for the value of the land. There is also an allegation that at some time more than five years before the commencement of the proceedings for the rendition of the account of the defendant, defendant permitted the premises to be taken possession of by intruders, without title, and surrendered the possession to the intruders, and there has been an actual continued occupation of the land by the intruders and their successors under a claim of title exclusive of any other right; and that plaintiff is unable to recover possession because the cause of action is barred by the Statute of Limitations.

Defendant demurred on the grounds:

1. This Court had no jurisdiction of the subject matter of the action.

2. There is a defect of parties defendant in that Adams should have been made a party.

3. The complaint does not state facts sufficient to constitute a cause of action.

4. Waived.

5. The cause of action is barred by sections 336 and 343, C. C. P.

The Court sustained the demurrer on the first, second, and fifth grounds. Plaintiff failing to amend, judgment went for defendant, and plaintiff appealed.

The defendant cites, in support of the judgment of the Court below, the opinion of this Court in *Sweeney* vs. *Brumagin*, January session, 1880, and contends that plaintiff had her day in the Probate Court. That case, however, does not apply to this case, so far as it is presented on demurrer, ex-

cept to hold that the judgment of the Probate Court was conclusive. The case presented by the complaint herein is entirely different from the case presented by *Sweeney* vs. *Brumagin*. Here we have allegations of a decree that the executor was chargeable with the possession of real estate, a distribution of the estate to the devisee, a direction that the executor deliver the estate to the devisee, and that the executor, after demand, has neglected and refused to deliver the same. The complaint does not in any essential particular rest upon the averment that at a time more than five years before commencing the proceedings for the account the executor had violated his duty. The complaint can be sustained even if that clause were omitted. No motion to strike out was made.

Section 1666, C. C. P., provides for the decree of distribution, and that the persons to whom distribution has been made may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. When a decree of distribution has been made, the Probate Court has no longer jurisdiction of the property distributed, unless to compel delivery (*Ex parte Smith*, 53 Cal. 204), and the distributee thenceforth has an action to recover his estate, or, in proper cases, its value. If an executor had possession of property, his duty is not ended until he has delivered the property in accordance with the decree, and not till then can he have his discharge. (C. C. P., 1697.) If property was in his possession, and has been distributed by decree, he cannot shield himself from obeying the decree by saying that the Probate Court alone had jurisdiction. We are, of course, considering this case as presented on demurrer to the complaint alone.

It is no objection that Adams was not joined. The allegation is that he left the State in 1855, and has not since returned; and that the Probate Court adjudged the defendant to be in possession. If one of two executors be absent from the State, the other can administer; and his accounts can be settled and a distribution be had. The presence of Adams was not necessary. (C. C. P., 1355.) There is no allegation that *he* was directed to deliver the property.

The action is not barred by the Statute of Limitations. The right of action is based on the decree of distribution of April 17, 1876, and the complaint was filed August 6, 1878.

The judgment is reversed, and the cause remanded to the Superior Court of the city and county of San Francisco, with instructions to overrule the demurrer, with leave to defendant to answer.

DEPARTMENT NO. 2.

[Filed March 4, 1880.]

[No. 6007.]

REYNOLDS vs. BRUMAGIM.

PROBATE—FINAL SETTLEMENT. The final settlement of an administrator's account is conclusive upon all the parties in interest having notice.

FINDINGS are not necessary where a judgment of nonsuit is granted. Unless the transcript show findings were not waived, it will be presumed they were in support of the judgment.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

James B. Townsend, for appellant.
S. Heydenfeldt, Jr., for respondent.

By the Court, MYRICK, J.:

T. B. McManus died intestate January 15, 1861. On the 8th of August, 1864, defendant Brumagim was appointed administrator of the estate of the deceased, and received letters. August 26, 1866, Brumagim returned and filed an inventory and appraisement of the estate of the intestate, which set out a tract of land by metes and bounds, valued at $1,000, and, referring to the tract, contained the following words: "The above land is held by parties in possession, claiming to hold the same adversely to the estate."

May 1, 1867, Isabella McManus, sister and heir of deceased, filed in the Probate Court her petition, stating the issuance of letters to Brumagim; that she had come to this State for the purpose of administering upon the estate, and to have it distributed to her as sole heir-at-law; that the property of the estate had been appraised at $1,000; that Brumagim had expressed his desire to resign his trust in order that letters might be issued to her, and had annexed thereto his resignation, and praying that letters be issued to her in the place of said Brumagim at the same time Brumagim's resignation was filed. On the same day Brumagim filed his account, which contained the item: "To real estate, amount as per inventory and appraisal on file, $1,000." Afterwards on May 6, 1867, after due notice, the Court found that no objection was made to the account, and that the administrator had accounted for all the estate that has come into his possesion; and allowed, approved, and settled the account, showing a balance due Brumagim of $218.05. On the same day the Court made an order, finding that the adminis-

trator had duly settled his accounts and delivered up the property of the estate to Isabella McManus, accepting his resignation, and thereupon decreed him "released and discharged from his said trust, and his letters of administration are hereby vacated."

June 6, 1867, Isabella McManus received general letters; and August 13, 1867, as administratrix, commenced an action in ejectment to recover possession of the real estate referred to in the inventory. The defendants in that action, among other defenses, pleaded the Statute of Limitations. The verdict was for the defendants.

Thereupon, April 30, 1870, the said Isabella McManus, as administratrix, commenced this action against Brumagim, alleging neglect on his part to institute proceedings to recover said real estate, and that by reason of such neglect the property had become lost to the estate, and laid the damages at $125,000. Upon the trial of the case, at the conclusion of plaintiff's evidence, defendant moved for a nonsuit on the grounds—

1. An administrator cannot maintain an action against a former administrator.

2. The order allowing the account, and the order accepting the resignation and discharging defendant, released him from all liability.

3. The action is barred by the Statute of Limitations.

4. That no title in T. B. McManus is proved.

5. No negligence on the part of the defendant was proved.

The motion was granted. Plaintiff moved for a new trial, which was denied, and plaintiff appealed. Since the appeal Isabella McManus died; and Reynolds, having been appointed administrator of the estate of T. B. McManus, has been substituted in her place and is now plaintiff.

From the view we take of the case, it is necessary to consider but one point—viz., that the order allowing the account and the order accepting the resignation and discharging Brumagim as administrator released him from all liability.

During the time that Brumagim was administrator, Isabella McManus frequently urged him to institute proceedings to recover the estate. He neglected to act in accordance with that request. She, being much annoyed at such omission, requested him to resign in order that she might be appointed, and herself institute an action. In pursuance of that request, he did resign, and filed his account, which was settled and allowed. His resignation was accepted, and he was discharged. His inventory contained a reference to the property and its condition—viz., that it was held adversely.

His account also contained the item of the appraised value of the estate. He thus challenged attention to the fact of the property, and that it was held adversely. No objection was made to the account; no effort to surcharge or falsify. She was as well aware as he that the property was adversely held, that he had omitted to institute proceedings, and that the Statute of Limitations was running. There was no imposition in and about the settlement of the account. If he incurred any liability, it was full and complete at the time of the settlement; and she could have surcharged or falsified the account. The Court could in terms have settled the account as rendered, expressly reserving all question as to liability for the omission now complained of.

If he had permitted the Statute of Limitations to bar a recovery, her suit to recover the property was not needed to establish the fact. Under our system, the Probate Court had jurisdiction to settle the accounts of an administrator, and to ascertain and determine his liability to the estate; and the decree of that Court, settling the accounts and fixing the amount of liability, is conclusive.

Section 1637, C. C. P. (sec. 237 Probate Act, as then in force) reads: "The settlement of the account and the allowance thereof by the Court, or upon appeal, is conclusive against all persons in any way interested in the estate—saving, however," etc. This case is not within the saving clause.

Section 1908, C. C. P., declares that the judgment or order of a court, having jusisdiction as to the administration of an estate, is conclusive.

Tebbets vs. *Tilton*, 24 N. H. 120, was an action on a promissory note made by defendant's intestate. Defendant pleaded that her accounts as administratrix had been duly settled by the Judge of Probate, and she had been discharged from all claims of creditors against the estate. Plaintiff replied that defendant did not return a just inventory; that she had, and ever since hath had, in her possession goods and chattels of the intestate of the value of $500, which were not accounted for. Held, if the Court acts within its jurisdiction as to the subject matter of its decisions, as to the persons to be affected, and as to the course of proceedings prescribed for it by law, its decisions are binding and conclusive on all parties interested. The replication was adjudged bad in substance, no fraud being charged in obtaining the settlement of account and discharge. (See also *Clark* vs. *Callaghan*, 2 Watts, 259; *Bryant* vs. *Allen*, 9 N. H. 116; *Estate of Stott*, 52 Cal. 403; *Graff* vs. *Mesmer*, 52 Cal. 636.)

We are of opinion that Brumagim and all persons (not

under disability) interested in the estate, had their day in court when the account was rendered and came on for settlement, and that the settlement thereof is conclusive, and that plaintiff cannot maintain this action.

We are asked to reverse this judgment because there are no findings. There are two answers to this—viz.: 1. It does not appear from the transcript that findings were not waived. 2. A nonsuit having been granted, findings were not necessary.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed March 12, 1880.]

[No. 6179.]

JOHN GRANT vs. E. W. BURR ET ALS.

A DEED OF TRUST given to secure a debt which authorizes the trustees therein named to sell and convey the property upon default in the payment of the debt is not a mortgage requiring judicial foreclosure.

STATUTE OF LIMITATIONS. The expiration of the statute time for bringing an action to recover a debt, or to foreclose any personal obligation, does not operate either an *extinguishment* or *payment* of the debt.

Appeal from the District Court of the Fourth Judicial District, San Francisco.

Jos. M. Nougues, for appellant.

Cowles & Drown, for respondent.

By the Court, MCKINSTRY, J.:

1. The instrument annexed to the complaint, and marked "Exhibit D," is a deed of trust which authorizes the trustees therein named to sell and convey the lands described, upon default in the payment of the note or interest, and is not a mortgage requiring judicial foreclosure. (*Koch* vs. *Briggs*, 14 Cal. 256.) The doctrine of *Koch* vs. *Briggs* has never been overthrown by subsequent decisions.

2. Appellant's second point is, that the promissory note "C," secured by the deed "D," was barred by limitation before "default" was declared by the Board of Directors of the Savings and Loan Society, and that all remedy against the security for its payment became barred with the note.

Section 17 of the Statute of Limitations, which was in operation before the Codes, provided that actions could "only be commenced" within the period mentioned. (Hittell's G. L., p. 635.) The provision of the Code of Civil Procedure

is: "The periods prescribed for the commencement of actions are * * * within *four* years; an action upon any contract, obligation, or liability upon any instrument in writing," etc. The Statute of Limitations is to be employed as a shield and not as a sword; as a means of defense, and not as a weapon of attack. It is true that *Arrington* vs. *Liscom*, 34 Cal., has sometimes been supposed to hold the contrary. But *Arrington* vs. *Liscom* was, in effect, an action by one in possession to *quiet title* under the 254th section of the former Practice Act. The plaintiff's possession established his case *prima facie*, and—as against the assertion by the defendant of a right to the possession—plaintiff was permitted to rely upon his five years' *adverse* possession. In that case Mr. Justice Sawyer used the language following: "*Whatever may be true of personal contracts*, it certainly cannot be said with reference to realty, in view of the authorities cited, that the statute only takes away a remedy, or that a right—a title—is not *practically* extinguished as to one party and acquired by the other. The five years' adverse possession—*practically at least*—is conclusive evidence of title in the possessor." Undoubtedly, as that case was presented, and for all "practical" purposes, it was immaterial whether the five years' adverse possession was treated as operating a transfer of the title of the defendant to the plaintiff, or considered as creating an estoppel to the assertion of the defendant's right to the possession; and the learned Judge in terms reserved any expression of opinion as to the effect of the statutory limitations upon contracts relating to personality.

It has never been held that the expiration of the statute time for bringing an action to recover a debt, or to enforce any personal obligation, operated either an *extinguishment* or *payment*. Such a result cannot be derived from the language of our statute, the reason or policy of the law, or the decisions of courts in this State or elsewhere. The contrary has been often held, and by our established rules of pleading the limitation must be specially pleaded or it is waived.

No action has been commenced upon the promissory note. The present plaintiff, however, who has transferred the legal title to the lands conveyed as security for the payment of an indebtedness, which has never been satisfied in whole or in part, comes into *equity* to ask that the sale by the trustees under the power conferred by his deed be enjoined, without tendering payment; but, on the contrary (since he asks that the debt be held to be extinguished), boldly avowing his intention never to pay.

Order affirmed.

DEPARTMENT NO. 2.

[Filed March 11, 1880.]

[No. 6395.]

M. GOODWIN (DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF "M. GOODWIN & CO."), PLAINTIFF,

vs.

C. A. BUCKLEY ET AL.

ATTACHMENT—ACT REPEALED BEFORE TAKING EFFECT. The Act of March 24, 1874, amending section 539, C. C. P., relative to undertakings for attachment, which was to take effect July 1, 1874, was repealed before it took effect by the Act of March 30, 1874, which went into effect immediately.

Appeal from the District Court of the Twenty-third Judicial District, San Francisco.

Jos. M. Nougues, for appellant.

J. M. Wood, for respondent.

By the Court, MORRISON, C. J.:

This is an appeal from an order of the late District Court of the Twenty-third Judicial District, made on the 3d day of September, 1878, denying defendant's motion to dissolve an attachment issued in the above entitled action.

In the transcript is found a stipulation that a complaint in proper form, and sufficient to justify the issuance of an attachment, was duly filed in said action. It also appears from the transcript that an affidavit for an attachment was filed in the case, and that thereupon a writ of attachment was duly issued on the 6th day of July, 1875.

On the 2d of September, 1878, defendant gave notice of his motion to dissolve the attachment; and after hearing said motion, the District Court, on the 3d day of September, 1878, denied the same; whereupon defendant took an appeal to this Court, and assigns as error the refusal of the Court below to dissolve the attachment.

In his notice of motion defendant assigns several grounds; but it is only necessary to notice the fifth, as that was the only ground relied upon on the argument of the appeal. It is as follows:

"*Fifth.* The undertaking on attachment, filed by and on behalf of the plaintiff, omits and does not contain any covenant, condition, or obligation to the effect that plaintiff will pay all costs, including reasonable attorney fees that may be adjudged to the defendants, and all damages which they may sustain by reason of the attachment, not exceeding the sum

specified in the undertaking, if the attachment be wrongfully issued."

The difficulty in this case grows out of two conflicting and contradictory acts of the Legislature, one of which was passed March 24, 1874, to go into effect July 1st of that year, and the other was passed March 30, 1874, to go into effect immediately. The undertaking was given under the latter act, and is sufficient if that act was in force at the time. But it is claimed that after July 1, 1874, the Act of March 24th was in full force and effect; and under that act the undertaking is obviously defective and insufficient. The argument is that, as the Act of March 24th was not to go into effect until July 1, 1874, the Act of March 30th, which went into effect immediately after its passage, did not repeal it, as it was simply the intention of the Legislature, by the last enactment, to cover the interval between the 30th of March and July 1st, during which the Act of March 24th was suspended.

The question now being considered does not involve the problem of two acts of the Legislature, containing conflicting and repugnant clauses; but the simple question is, which of the two acts in question was in force at the time the attachment was issued—that is to say, on the 6th of July, 1875—and upon this question we entertain no doubt. Both the Acts of March 24th and of March 30th were amendments to the same section (539) of the Code of Civil Procedure; and but for the fact that the Act of March 24th was not to go into effect until July 1st, it is quite probable that the controversy would not have arisen. The mere fact, however, that the first act was not to go into effect until a day subsequent to that upon which the second act was passed, does not change the rule that the last act is the latest expression of the legislative will and must prevail. It was within the power of the Legislature to declare that an act which was to take effect on a future day never should take effect, and this they did by passing the Act of March 30th.

In the case of the *Southwark Bank* vs. *The Commonwealth*, 26 Penn. State Reports, 449, the Supreme Court of Pennsylvania says: "But it is said that the legislative power cannot nullify or revoke a bill until it has gone through all the forms necessary to give it the effect of a law. There is neither principle, convenience, nor authority to support this position. The power to repeal a law involves the power to abrogate a bill in its progress before it becomes a law. The greater power includes the lesser." (*Jamison* vs. *Jamison*, 3 Wharton, 457.)

So in this case it was perfectly competent for the Legisla-

ture to declare in advance that an act which by its terms was to take effect at a future day, should never go into operation at all. This it clearly did when, on the 30th of March, it again amended section 539 of the Code of Civil Procedure.

The argument that the Act of March 30th was simply intended to bridge over the time during which the Act of March 24th was dormant, loses its force in view of the fact that there was already in existence the old section (539) of the Code of Civil Procedure on the same subject. The Act of March 30, 1874, is without any limitation as to the time it should continue in force and effect; and we find no authority for holding that it expired on the 1st day of July of that year.

The undertaking being in proper form under the act last above mentioned, the Court below was correct in denying defendant's motion to dissolve the attachment. There is nothing in the case of *Hemstreet* vs. *Wassum*, 49 Cal. 273, in conflict with this opinion.

Order appealed from affirmed.

DEPARTMENT NO. 1.

[Filed March 13, 1880.]

[No. 6993.]

HILL, RESPONDENT, vs. FINNIGAN, APPELLANT.

APPEAL—DISMISSAL OF. The failure of the sureties on an undertaking on appeal to justify after exception to their sufficiency, does not render the appeal ineffectual.

DIMINUTION OF RECORD—WHAT MAY BE SUPPLIED UPON SUGGESTION OF. Where the record on appeal is complete, with the exception of a copy of the notice of appeal and of the undertaking on appeal, such parts of the record may be supplied.

SECOND APPEAL. When a valid appeal is existing, a second appeal is a nullity.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco County.

Lloyd & Newlands, for appellant.

Geo. R. B. Hayes, for respondent.

Ross, J., delivered the opinion of the Court:

In this cause judgment was entered in the Court below against the defendant on the 12th day of August, 1879; and, he having made a motion for a new trial, an order was entered on the 5th of December denying the motion. On the 23d of December the defendant served and filed a notice of appeal to this Court from the judgment and order, and on

the same day filed an undertaking on appeal. On the 29th of December the plaintiff filed a notice of exception to the sufficiency of the sureties on the undertaking, and the sureties failed to justify. On the 3d day of February, 1880, the defendant, erroneously supposing that the appeal already taken had become ineffectual by reason of the failure of the sureties to justify, served and filed another notice of appeal from the judgment and order, and another undertaking.

Rule 2 of this Court prescribes that appellant must, "within forty days after the appeal is perfected, and the bill of exceptions and the statement (if there be any) are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken."

Rule 3 is as follows: "If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed, on motion, upon notice given. If the transcript, though not filed within the time prescribed, be on file at the time the notice of the motion is given, that fact shall be a sufficient answer to the motion."

No transcript in this case having been filed, the respondent on the 17th day of February, 1880, served and filed a notice of motion to dismiss the appeal taken on the 23d day of December on the ground that no transcript had been filed within the time prescribed by Rule 2, and also to dismiss the appeal taken on the 3d day of February on the ground that there was no case then pending in the Court below from which an appeal could be taken. In the certificate of the clerk, upon which this motion to dismiss is based, and from which the facts above stated are taken, appears the following: "That on the 14th day of February, 1880, appellant received from me a duly certified transcript of the record in said action, which contained the notice of appeal served and filed on the 3d day of February, 1880, and a certificate that the undertaking on appeal, filed on said 3d day of February, 1880, had been properly filed in said action on the 3d day of February, 1880, and was in due form of law; but said transcript did not contain the notice of appeal served and filed on the 23d day of December, 1879, nor any copy of or certificate as to the undertaking on appeal filed on said 23d day of December, 1879, and that said transcript is the only one received by said appellant from me, and is the only transcript which appellant has requested me to certify to in this action."

On the day the notice of motion to dismiss was served and filed—that is to say, on the 17th day of February—the printed

transcript was filed with the clerk of this Court. Some controversy exists between the respective parties as to which of these acts was prior in point of time, but we will not look into the fractions of a day for the purpose of dismissing an appeal. (*St. John* vs. *Meyerstein*, No. 5856, not reported.) Without determining, therefore, this disputed fact, it must be considered that the transcript was on file at the time the notice of motion to dismiss was given.

On the hearing of the motion, appellant's counsel suggested a diminution of the record, and asked to have inserted in the transcript a certified copy, which he produced, of the notice and undertaking on appeal, filed on the 23d of December, pursuant to Rule 12, which provides that "for the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and, upon good cause shown, obtain an order that the proper clerk certify to this Court the whole or part of the record, as may be required, or may produce the same duly certified, without such order."

This application on the part of appellant was resisted by respondent, who urges that the transcript on file only relates to the appeal attempted to be taken on the 3d day of February, which, it is claimed, was a separate and independent appeal, and cannot have any relation to the appeal of the 23d of December; and that there being (in his view) no transcript on file so far as the first appeal is concerned, he is, under the rules, entitled to its dismissal, as well as to the dismissal of the last appeal.

It was held in *Schacht* vs. *Odell*, 52 Cal. 449, that the failure of the sureties on an undertaking on appeal to justify, after exception to their pecuniary sufficiency had been taken, did not render the appeal ineffectual. The appeal taken in this case on the 23d of December was therefore a valid one, and vested this Court with jurisdiction of the cause. It follows that the attempted appeal of February 3d was a nullity, for there was nothing then pending in the District Court from which an appeal could be taken.

Now the appellant has taken a valid appeal to this Court; and he has, and had, on the day the notice of motion to dismiss was given, on file with the clerk a certified transcript of the record in the action, with the exception of a copy of the notice of appeal and of the undertaking on appeal. This is shown by the certificate upon which the motion to dismiss is based, which in terms declares that on the 14th of February, 1880, the clerk of the Court below furnished appellant with "*a duly certified transcript of the record in said action*," containing the notice and undertaking filed February 3d, but not

that filed December 23d. It is a complete record with that exception, and the omitted matter is sought to be supplied by appellant, upon suggestion of diminution, under Rule 12. No good reason exists why he should not be allowed to do so. He desired to appeal, and succeeded in taking a valid appeal from the judgment and order against him, and has brought up and filed here a record, which can be made complete by the insertion of the first instead of the last notice and undertaking. The circumstance that he was in error in supposing that his right to be heard in the Appellate Court depended upon the last rather than the first notice and undertaking, is of no consequence. The error can be cured in the mode suggested, without prejudice to any substantial right of respondent. We are not disposed to dismiss appeals upon technical objections.

Appeal of February 3, 1880, dismissed. Motion of appellant to insert in transcript on file the notice of appeal and undertaking on appeal filed December 23, 1879, allowed; and motion of respondent to dismiss the said appeal denied.

We concur: McKee, J., McKinstry, J.

IN BANK.

[Filed March 15, 1880.]

[No. 6916.]

THE CALIFORNIA FURNITURE CO., PETITIONER, vs. CHARLES HALSEY, JUDGE OF THE SUPERIOR COURT, CITY AND COUNTY OF SAN FRANCISCO.

INSOLVENCY—PARTNERSHIPS NOT ENTITLED TO BENEFITS OF THE ACT. There is no provision in the insolvent law of this State authorizing a partnership to apply in its joint name for the benefit of the act.

RIGHTS OF PARTNERSHIP CREDITORS. Firm creditors have priority over individual creditors as against partnership assets; so where an individual member of a partnership files his petition in insolvency, the partnership creditors may pursue the partnership property, and the court where the insolvency proceedings are pending has no power to prohibit them.

Application for writ of *certiorari*.

Cowdery & Preston, for petitioner.

J. D. Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This is an application for a writ of *certiorari*, made upon a petition presenting substantially the following facts: That

upon the 29th day of December, 1879, one B. F. Buhr filed in the County Court of the city and county of San Francisco his petition in insolvency, in pursuance of the act entitled, "An act for the relief of insolvent debtors and protection of creditors," approved May 4, 1852. That attached to the said petition was the schedule required by section 3 of said act, and that upon the filing of the said petition the County Judge of said city and county made an order requiring the creditors of said Buhr to appear at a specified time and place, and show cause why an assignment of the insolvent's assets should not be made; and at the same time said County Judge made an order staying all proceedings against said insolvent debtor. That at the time of filing said petition, and for more than one year prior thereto, said B. F. Buhr and one A. M. Bandy were copartners, doing business under the firm name and style of "Buhr & Bandy." That the California Furniture Company is a corporation duly organized, etc.; and that on the 20th day of December, 1879, said firm of Buhr & Bandy was indebted to said corporation in the sum of $142.32 for goods, wares, and merchandise sold and delivered to said firm by said corporation. That on the 29th day of December, 1879, said California Furniture Company commenced an action in a Justice's Court of the city and county of San Francisco against said firm of Buhr & Bandy for the recovery of said indebtedness, and thereafter—to-wit, on the 3d day of January, 1880—duly recovered a judgment in said Justice's Court against said Buhr & Bandy for the amount of said indebtedness. That an execution was afterwards issued upon said judgment, and was placed in the hands of the proper officer. That upon satisfactory proof that the defendants had assets belonging to said copartnership in their possesion or under their control which they refused to apply to the satisfaction of said execution, the said justice of the peace made and entered an order requiring the said defendants to appear, at a time and place designated in said order, and answer concerning said partnership property. That, by virtue of the law, the insolvency case of *Buhr* vs. *His Creditors* was, on the 1st day of January, 1880, transferred to the Superior Court of the city and county of San Francisco, where said cause is still pending and undetermined. That after the said transfer, and after said case had been assigned to the department of said Superior Court over which said Charles Halsey presides, the said Superior Court made an order denominated a writ of prohibition, whereby the examination of said Buhr by the said Justice's Court was absolutely prohibited. It is this writ of prohibition so issued by

the Superior Court that is complained of, and which we are asked to review on this writ of *certiorari*.

There is no provision in the insolvent law authorizing a partnership to apply in its joint name for the benefit of the act. (*Meyer* vs. *Kohlman*, 8 Cal. 44.) The application in this case was made by one member of the firm; and the question is, What effect did such application have upon the rights and claims of the creditors of the firm? Was their right to pursue the partnership assets affected by the insolvency proceedings of one of the partners?

It is a familiar principle that the partnership property must first be applied to the payment of the partnership debts, and that the interest of each member of the firm is limited to such property as may be left after the claims of partnership creditors have been satisfied.

"The debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners." (*Chase* vs. *Steele*, 9 Cal. 64.) "At common law, a partnership stock belongs to the partnership, and one partner has no interest in it but his share of what is remaining after all partnership debts are paid." (*Burpee* vs. *Bunn*, 22 Cal. 194.)

The effect of a dissolution of a partnership by death, bankruptcy, or by insolvency, is thus stated by Judge Story in his work on "Partnership:"

"Still another inquiry may remain in cases where the estate of the deceased partner is not sufficient to pay all his separate debts and all the joint debts; and that is, whether the debts are to be paid *pari passu* out of the assets of the deceased, or either is entitled to a preference. The general rule would seem to be (as it is in bankruptcy) that the joint creditors have a priority of right to payment out of the joint estate, and the separate creditors a like right of priority to payment out of the separate estate; and the surplus, if any, is divisible among the other class of creditors." (Section 363.) And again: "In the latter case (of bankruptcy) the like equity attaches to the solvent partners, and the assignees can stand only in the place of the bankrupt and take his right, and consequently they are entitled to nothing except the surplus after the discharge of all the joint debts and of the claims of the other partners." (Section 361; *Allen* vs. *Center Valley Company*, 21 Conn. 130.)

In this case the creditors of the firm of Buhr & Bandy had a right to pursue the partnership property under their judgment against the firm, and the proceeding taken against Buhr & Bandy under the order of the Justice's Court was

regular and legal. It was error, therefore, for the Judge of the Superior Court to issue the writ of prohibition complained of; and we are of opinion that in issuing said writ said Judge exceeded his jurisdiction. (*Cohen et al.* vs. *Barrett & Sherwood*, 5 Cal. 95; *Meyer* vs. *Kohlman*, 8 Cal. 44.)

Order annulled.

We concur: McKee, J., Myrick, J., Ross, J., Thornton, J., McKinstry, J., Sharpstein, J.

DEPARTMENT NO. 2.

[Filed March 16, 1880.]

[No. 6444.]

OTIS J. PRESTON ET AL., APPELLANTS,

vs.

GEORGE HEARST ET AL., RESPONDENTS.

PRACTICE—NEW TRIAL—WHEN STATEMENT INSUFFICIENT. When the notice of motion for a new trial designates the insufficiency of the evidence to justify the verdict or decision as the ground of the motion, the statement should specify the particulars in which such evidence is insufficient.

QUERY? Whether the following entry is a judgment: "This cause having been heretofore submitted to the Court for decision, and the Court being advised, now orders that the plaintiffs take nothing by their action, and that the defendants have judgment for their costs herein."

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Douthitt & McGraw, for appellant.

McAllister & Bergin, *E. A. Lawrence*, *Stewart & Greathouse*, and *W. C. Burnett*, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This is an appeal from *what is called a judgment* in the above case, as well as from an order of the Court below denying plaintiff's motion for a new trial.

The decision of the Court upon a motion for a new trial cannot be considered on this appeal, for the reason that the statement is insufficient for that purpose. Subdivision 3, of section 659, of the Code of Civil Procedure, provides that "when the notice of the motion designates as the ground of the motion the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient." The statement in this case fails to specify such particulars, and does not comply with the foregoing provision of the Code. It is therefore insufficient. (*Phillip* vs. *Lowrey et al.*, No. 6103, decided at the present January session.)

There is also an appeal from what was called upon the argument the judgment in the case. It is in these words:

"This cause having been heretofore submitted to the Court for decision, and the Court being advised, now orders that the plaintiffs take nothing by their action, and that the defendants have judgment for their costs herein. Entered October 29, 1877. Minute Book K, p. 197." The notice of appeal was filed November 22, 1878.

It is unnecessary for the Court to determine at this time whether the above entry is a judgment or not. If it is a judgment, the appeal was not taken in time, and should therefore be dismissed. If it is simply an order for a judgment, the appeal has been prematurely taken and cannot be entertained.

Order denying motion for a new trial affirmed, and the other appeal dismissed.

We concur: Thornton, J., Myrick, J.

DEPARTMENT No. 2.

[Filed March, 1880.]

[No. 10,467.]

PEOPLE vs. BROWN.

CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS—ADMISSIONS AS TO TESTIMONY WHEN INSUFFICIENT. Where an affidavit for continuance stated that by the absent witness it would be proved that the prosecuting witness did not have in his possession, on the night of the alleged larceny, any money whatever, and that said prosecuting witness so told him, it is error to refuse the continuance because the District Attorney admits that the prosecuting witness did tell the absent witness a few minutes before he met the defendant that he had not in his possession any money whatever.

Appeal from the Municipal Criminal Court, San Francisco County.

Robert Ash, for appellant.

Attorney-General Hart, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The defendant moved for a continuance on the ground of the absence of a material witness by whom he (defendant) stated in his affidavit that he expected to prove that Ared Howe, said absent witness, "was in company with the prosecuting witness, Myron B. Gesford, on the night of May 9, 1879, in the city and county of San Francisco, and that the said Myron B. Gesford did not, on that night aforesaid, have

in his possession and with him any money whatever; that the said Myron B. Gesford so told the said witness, Ared Howe, on that night," etc.

The defendant was indicted for stealing money and gold dust from the person of the prosecuting witness on that night. Proof that he had no money on that night was of the utmost importance to the defendant. The District Attorney admitted that the prosecuting witness told the absent witness, Howe, on the night in which the larceny was said to have been committed, and a few minutes before he met the defendant, that he, the prosecuting witness, had not in his possession and with him any money whatever. To that admission the defendant objected on the ground that it was not sufficient to admit that the prosecuting witness said that he did not have in his possession and with him any money. Whereupon the Court overruled the objection and denied the motion for a continuance, to which the defendant excepted.

There was no objection to the sufficiency of the affidavit to entitle the defendant to a continuance, and the Court seems to have based its denial upon the sole ground that the admission above stated obviated the necessity of having the witness testify to the facts which the defendant swore that he expected to prove by him, if present. But it is too plain to admit of doubt that the admission does not cover the most material part of what the defendant stated in his affidavit that he expected to prove by the absent witness, viz.: *That the said prosecuting witness did not, on the night aforesaid, have in his possession and with him any money whatever.* If that had been admitted in connection with the other fact, that the prosecuting witness so stated to the absent witness, the denial of the motion for a continuance upon the ground on which it was based would not be error. As no other ground was stated at the time for refusing the application, we shall not seek for any other, because if some other objection had been stated it is quite possible that it might have been obviated by an amended affidavit. The admission was clearly insufficient to justify the Court in overruling the motion for a continuance.

Another specification of error is, that the evidence was insufficient to justify the verdict. That would have to be very clearly shown before we would disturb the verdict; and as there must be a new trial, we deem it our duty to abstain from any comment upon the testimony.

Judgment and order denying the motion for a new trial reversed.

We concur: Myrick, J., Thornton, P. J.

Abstract of Recent Decisions.

OREGON SUPREME COURT.

LARCENY. One who receives money from another to which he knows he is not entitled, and which he knows has been paid to him by mistake, and concealed such over payment, appropriating the money to his own use with intent to defraud the owner thereof, is guilty of larceny.—*State* vs. *Ducker*, February 24, 1880.

INSTRUCTIONS PRESUMED. Where a bill of exceptions is silent as to whether certain instructions were given which are necessary to sustain the judgment, it must be presumed that they were given; and especially where it appears that other instructions were given which are not specifically set out therein.—*Id.*

WATER RIGHTS. Where S. granted to C. all the water in a certain creek, and the right to convey such water over the land of S. to the land of C., and grants C. the right to enter upon lot one (land of S.), and build, maintain, repair, and keep up and in operation all dams, ditches, pipes, aqueducts, or flumes necessary and proper for the conveyance of said water to the premises of said C., such conveyance gives to C. the right to construct several canals or courses.—*Spear* vs. *Cook*, February 26, 1880.

SAME. By such conveyances the grantee has the right to convey all the water, and at different times and places.—*Id.*

SAME. Such grantee may first construct a ditch and take part of the water, and afterwards construct another ditch to convey the balance, or enlarge his first ditch.—*Id.*

SAME. Such grantee may also change his ditch when located, if such change is necessary to enable him to carry the water in a convenient and reasonable manner.—*Id.*

SAME. Such grantee may also float wood through his ditch, provided he does not thereby injure the grantee.—*Id.*

EQUALIZATION OF TAXES. A writ of review may be prosecuted to review the orders made by the Board of Equalization of a county correcting the assessments of an individual taxpayer.—*Popleton* vs. *Yamhill Co.*, February 16, 1880.

RAISING ASSESSMENT. Said Board of Equalization has power to raise the assessment of an individual taxpayer by adding to his assessment property owned by him which was not found included in his assessment by the assessor.—*Id.*

FRAUD ON REVENUE. If a taxpayer having a large amount of notes and mortgages, in order to escape the payment of taxes on the same, borrow a small sum of money of a person residing out of the county, and deposits with his creditor such notes and mortgages for the purpose of avoiding the taxes on the same,

such notes are taxable in the county where such taxpayer resides; and such deposit or transfer is a fraud on the revenue of the county, and it is competent for the Board of Equalization to try this question of fraud.—*Id.*

QUESTIONS OF FACT. In trying questions in cases of review, this Court will not try questions of fact which were passed on by the inferior Court, unless such findings are manifestly wrong. —*Id.*

TAXABLE PROPERTY. Notes and mortgages are property which are subject to taxation.—*Id.*

SUFFICIENT COMPLAINT. Where all the facts necessary to show the plaintiff's cause of action appear in the complaint, although irregularly stated, such complaint will, after verdict, be sufficient to support a judgment.—*Cooper* vs. *McGrew*, February 16, 1880.

LANDLORD AND TENANT. Where a landlord leases land, and reserves as rent a part of the crop, the tenant cannot sell or dispose of the part so reserved, and the landlord and tenant are tenants in common in relation to such crop.—*Id.*

ACTUAL BIAS—REVIEW. This Court will not review the ruling of the Court below on a challenge for actual bias in a juror, unless all the evidence upon which that Court acted is reported to this Court.—*Hayden* vs. *Long*, February 16, 1880.

WATER RIGHTS. H. is the owner of the land throughout which a small stream of water runs, used by him for propelling machinery. L., not being the owner of any lands adjoining said stream, went above the land of H. and diverted a portion thereof from its natural channel, and conducted it over and across the lands of other persons to some place where it was used for irrigation and other purposes, by means of which portions thereof were wasted. *Held*, that such diversion was unlawful; and while the instructions of the Court contained a correct statement of the law as to the respective rights of riparian owners, they were inapplicable to the facts developed in this case, as the deviation was made by a party who was not a riparian owner. —*Id.*

CONSTRUCTION OF DEVISE. The general rule is, that a devise in designating the objects of the testator's bounty speaks from the time of his death, unless a contrary intent can be inferred from some particular language of the will, or from such intrinsic facts as may be entitled to consideration in construing its provisions. The will of G. provides that: "I devise all that may remain of my real and personal property to each of my living children, and the children of my deceased daughters, alike." *Held*, that the latter, being mentioned in their representative capacity—thus evincing the purpose of the testator to give them the shares their mothers would have taken if they had survived him—should be divided *per stirpes*, and not *per capita*.—*Gerrish* vs. *Gerrish*, February 17, 1880.

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Current Topics.

WE call attention to the supplement accompanying this number. It contains the able opinions of Judges HOFFMAN and SAWYER upon the constitutionality of the State laws forbidding employment by corporations to Chinese.

WE have just received the opinion of the Supreme Court of the United States in *Meeks* vs. *Olpherts et al.*, in error to the Circuit Court of the United States for the District of California, in which it is held: (1) That the statute of California which requires an action for real estate sold by order of a probate court, which action is adverse to the sale, to be brought within three years after such sale, applies to an administrator who made the sale, as well as to the heirs, because the right of action is in the administrator, and not in the heirs. (2) That when the action is barred by lapse of time against the administrator, it is also barred against the heirs, because the right of possession is, by the law of California, in the former; and when the bar is complete against him, it is also perfect against the heir whose interest is represented by the administrator.

RULE 8 of the Circuit Court of the United States for this District has been amended so as to read as follows:

"Service of summons shall be made by the Marshal of the District in person, or by his duly appointed deputy. A copy of the complaint, certified by the clerk or the plaintiff's attorney, shall be served with the summons, and in case the defendant fails to appear and file his plea, answer, or demurrer in conformity with the requirement of the summons, the clerk shall, on the written request of the plaintiff or his attorney—to be filed in the cause—enter his default; and thereafter the proceedings in the action shall be in conformity with the practice prescribed for the State Courts by the statutes of the State in like cases."

Supreme Court of California.

DEPARTMENT No. 2.

[Filed March 15, 1880.]

[No. 6478.]

JONES, RESPONDENT,

vs.

CHALFANT, APPELLANT.

ASSIGNMENT OF JUDGMENT—SET OFF. The assignee of a judgment must show that he is really the absolute owner, or he cannot set it off.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

Howe & Rosenbaum, for respondent.

Geo. A. Nourse and *J. D. Thompson*, for appellant.

THORNTON, P. J., delivered the opinion of the Court:

On the 27th of September, 1877, in the Nineteenth District Court, a verdict was rendered herein in favor of Jones against Chalfant for the sum of $1,217. Judgment did not appear to have been entered on this verdict until the 28th day of January, 1878, when it was entered for the amount above mentioned, and for $345.35 cost of suit. Chalfant subsequently moved to set off against this judgment, a judgment recovered by one A. W. Hall against the plaintiff herein (Jones) on the 4th day of August, 1874, in the Seventh District Court for the county of Mendocino, for the sum of $7,129.66 and $999.05 costs, which defendant (Chalfant) claims had been on the 28th of September, 1877, assigned to him by Hall. The motion came on to be heard on the 5th of April, 1878, at which time defendant read in support of it the judgment roll in the action of *Hall* vs. *Jones*, above referred to. In this action it appeared that Hall recovered judgment against Jones for the sum stated above on the day before mentioned. The defendant proved that there had been made by execution and paid on this judgment $788 on the 22d of September, 1874, and $495.66 on the 12th day of March, 1875; that as to the remainder due on this judgment, executions had been returned unsatisfied. Defendant further read in evidence an assignment of this judgment by Hall to Chalfant, a notice of the assignment signed by Chalfant and directed to Jones, and an affidavit of a service of the notice on Jones. The assignment bears date the 28th of September, 1877, and the notice appears from the affidavit to

have been served on Jones on the same day at 6 o'clock P. M. The plaintiff, Jones, offered in evidence his answer to the notice a petition of Howe & Rosenbaum, his attorneys in this action, and an assignment of the judgment herein by him to Howe & Rosenbaum. This last named assignment bears date the 28th of September, 1877.

The answer, so styled, sets up, among other things, that Chalfant never in fact paid any consideration to Hall for the assignment made to him, and that he (Jones) was not the owner of the judgment when the assignment was made to Chalfant by Hall, having on the 27th day of September, 1877, assigned it for value received to Howe & Rosenbaum.

The petition of Howe & Rosenbaum alleged that they are the attorneys of plaintiff in this action, and are the owners by assignment of the judgment herein made by Jones to them; that the assignment to them was made in consideration of moneys advanced and an indebtedness to them by Jones for legal services in this case and others, which assignment was executed to them before they had any notice of the assignment of the judgment of *Hall* vs. *Jones* to defendant. It is denied also in this petition that Chalfant paid anything for the assignment to him. On the 1st day of November, 1878, the Court below denied the motion, and from this order defendant appealed.

The ownership of the judgment by Chalfant was attacked by plaintiff. The assignee must show that he is really the absolute owner of the judgment, or he cannot set it off. (*Turner* vs. *Satterlee*, 7 Cowen, 480; *Mason* vs. *Knowlson*, 1 Hill, 218; *Meador* vs. *Rhyne*, 11 Rich. L. R. 631; *Aikin* vs. *Satterlee*, 1 Paige, 288.) And further, there was evidence before the Court of an assignment by Jones to Howe & Rosenbaum.

Whether Chalfant had such an ownership of the judgment of *Hall* vs. *Jones* that he could legally use it as a set-off, and whether Jones had executed the assignment to Howe & Rosenbaum before the assignment to Chalfant was executed to him by Hall, involved questions of fact which the Court below was called on to decide. These questions were decided by that Court adversely to the claims of the appellant, and we see no error in the record which would justify this Court in reversing the order.

We are not satisfied upon the evidence appearing in the transcript that the appellant was the absolute owner of the judgment recovered by Hall against Jones, and that he held the beneficial control of it.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed March 17, 1880.]

[No. 6341.]

ALTSCHUL, RESPONDENT, vs. DOYLE, APPELLANT, AND ALTSCHUL, RESPONDENT, vs. POLACK, APPELLANT.

PRACTICE AND PLEADING—BAR—FORMER JUDGMENT—LANDLORD AND TENANT. A landlord is not bound by a judgment against his tenant where it appears that the action was dismissed as to him and the evidence of his title stricken out, notwithstanding he was personally present at the trial and employed counsel for himself and tenant. Such a judgment is no bar to a subsequent action by the landlord for possession of the property.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Walter Van Dyke, for appellants.

E. A. Lawrence, McAllister & Bergin, for respondents.

MYRICK, J., delivered the opinion of the Court:

These two appeals were heard together. The first is an action of ejectment; the second is an action to quiet title. The defendants, besides denying plaintiff's title, and averring title in themselves, pleaded the Statute of Limitations, and also a former suit at bar. The findings of fact in the Court below in the first suit were: That plaintiff was seized in fee and entitled to the possession of the premises; that defendants ousted plaintiff and withhold possession; that defendants have no right, title, interest, or estate; that defendants have not acquired title by lapse of time and adverse possession; and that in the former suit, at the instance and motion of the plaintiff therein, Mary Polack, one of the defendants herein, said action was dismissed as to Rix, Lynch, and Altschul, plaintiff herein; and said Altschul was not permitted to defend the same for his tenant, James Doyle, Jr., and the title of Altschul was excluded from consideration, and plaintiff was not barred or estopped by said former suit. Judgment was thereupon rendered for plaintiff.

The findings in the second suit were that the Doyles were tenants of Altschul, and that Polack, with knowledge of that relationship, fraudulently obtained possession of the premises from plaintiff's tenants, and that plaintiff was not barred or estopped by the said former recovery against Doyle. Judgment was thereupon rendered for plaintiff. Motion for a new trial was made, which was denied, and defendants appealed.

In the Court below, to sustain the plea of the former judgment in bar, the defendants offered a record from which it appeared:

In 1865 Mary Polack commenced an action of ejectment against Lynch, Altschul, Mary Doyle, Rix, and three others sued by fictitious names, plaintiff alleging that defendants were in the possession of the premises sued for. The summons was served on all the defendants—James Doyle, Sr., and James Doyle, Jr., being the persons sued by fictitious names. The defendants answered, denying plaintiff's title, and alleging title in themselves and those under whom they claimed. During the trial the plaintiff dismissed the action as to Rix. At the close of the testimony plaintiff dismissed the action as to Altschul. Plaintiff then moved to strike out all the documentary evidence deraigning title as to defendant Altschul from Dorland. Defendants objected on the ground that James Doyle and Mary Doyle were defending under the title and by Altschul, they being his tenants and he defending for them, and they were entitled to the benefit of said deeds. The Court overruled the objection and struck out the deeds. The defendants, James and Mary Doyle, then moved the Court to open the evidence to allow them to prove that they were the tenants of Altschul, and to prove his title. The Court denied the motion. The following order was entered September 4, 1866:

(Title of cause.)

On motion of plaintiff's attorney, it is ordered by the Court that this cause be and the same is hereby dismissed as to the defendants, Alfred Rix, Ludwig Altschul, and James Doyle, Sr., and that a judgment for costs be entered in favor of said defendants and against the plaintiff. A motion for a new trial on behalf of M. Lynch was made, which was granted, and the action was subsequently dismissed as to him. These dismissals left the case standing in favor of *Mary Polack*, plaintiff, vs. *Mary Doyle* and *James Doyle, Jr.*, defendants, in which case judgment went for plaintiff and against defendants.

Altschul employed the counsel who appeared for himself and the Doyles, and was present during the trial and participated therein, so far as to obtain evidence and bring forward proofs of his own title and that of his tenants holding under him.

Upon this state of facts, we are asked to hold that Altschul is barred by the recovery by Mary Polack in the former writ, and is estopped from denying that his trial was adjudicated and passed upon therein. Various authorities

are cited, but counsel for appellant relies mainly upon the decisions of this Court in *Gray* vs. *Dougherty*, 25 Cal. 266, and *Valentine* vs. *Mahoney*, 37 Cal. 389. The latter case clearly announced the principle (followed and approved in *Russell* vs. *Mallon*, 38 Cal. 259) that if the landlord defends for and in the name of his tenants, and puts his title in issue in aid of his tenant's right of possession, the judgment against the tenant is a bar to a subsequent action by the landlord against the party recovering the judgment, and the landlord is estopped from saying that his title is not adjudicated. So in *Gray* vs. *Dougherty*: "It (the former judgment) is not only final as to the subject matter thereby determined, but also as to every other matter which the parties might have litigated in the cause, and which they might have decided. It must appear, however, that the subject matter in question was not only the same but that it was submitted on its merits, and actually passed upon by the Court." So in *Valentine* vs. *Mahoney*: "Mann, though not sued, defended the action, and his title was put in issue. In all cases in which the defendant is holding under a lease, and the lessor's title is in issue, it is proper, if not necessary, that the latter (the lessor) should have an opportunity to participate in the defense, for no one is as competent to prevent and defend his title as he. The landlord ought not to be deprived of the possession by proceedings in which he could take no part." The case proceeded upon the theory that the landlord did in fact take part in the controversy, and that his title was considered and passed upon. Sawyer, J., concurring, said: "It would be dangerous to extend the rule to cases where there is nothing in the record tending to show that the landlord took the defense of the action upon himself. The parties to be estopped ought certainly to be indicated by the record itself. It is sufficiently manifest from the record in this case that Mann was the party in interest who made the defense for his own benefit in the name of his tenants." And in *Russell* vs. *Mallon* the question was whether a judgment in an action of ejectment in which the landlord of defendant defends the action for and in the name of his tenant, *and puts his own title in issue*, is admissible in evidence by way of estoppel. Held, yea, on authority of *Valentine* vs. *Mahoney*.

Admitting to the fullest extent the reasonings and the conclusions reached in those cases, not only is the appellant not aided thereby, but the record here shows that these cases are not within the principles there decided. Instead of the title of the landlord having been submitted, passed

upon, and adjudicated, the landlord, having been made a party defendant, with an allegation of possession on his part, was dismissed from the action; the evidence of his title was stricken out, and the tenants were refused to have the benefit of that title. The record is not only not silent upon the subject, but it affirmatively appears that the landlord's title was not adjudicated.

It is claimed that as the landlord was personally present at the trial, employed counsel for himself and his tenants, and practically made whatever defense was made, he was bound by the judgment, because he had a legal right to be heard; and if the Court committed an error in denying him that right, he had an appeal, and his failure to prosecute an appeal was a waiver of his right; and on the argument it was directly insisted that, notwithstanding the fact that the plaintiff in the former action dismissed the suit as to Altschul, asked the Court to strike out the evidence of his title, and then objected to the defense of his title being made, thus inviting the Court to make an error (if it were an error), yet as Altschul, though no longer a party, did not appeal, he had his day and is barred. We cannot accede to that proposition. We think that the bare statement of the proposition conclusively shows the answer.

The case of *Windsor* vs. *McVeigh*, 3 Otto, 274, though not similar in facts, is parallel in principle, so far as concerns the binding effect of the judgment. In proceedings before a District Court, in a confiscation case, monition and notice having been issued and published, the appearance of the owner, for which they called, when made, was stricken out, his right to appear being denied by the Court: Held, that the subsequent sentence of confiscation of his property was as inoperative upon his rights as though no monition or notice had ever been issued. The legal effect of striking out his appearance was to recall the monition and notice as to him. The Court say: "Wherever one is assailed in his person or property, there he may defend, for the liability and right are inseparable. A denial to a party of the benefit of a notice [*i. e.*, to defend] would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear, and you shall be heard, and when he has appeared, saying: Your appearance shall not be recognized and you shall not be heard. The denial to a party in such a case of the right to appear is in legal effect the recall of the citation to him. It was not within the power of the jurisdiction of the District Court to proceed

with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. Jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in this case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore could be no exercise of jurisdiction."

It is proper to say, with reference to the case at bar, that the Court did not assume in the former suit to pass upon the rights of Altschul; it is the plaintiff therein who here asks that that which was not passed upon shall be now held to have been adjudicated.

The findings of the Court below on the other points made by appellant are sustained by the evidence.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, P. J.

IN BANK.

[Filed March 17, 1880.]

[No. 6944.]

M. W. LAMB, PETITIONER,

vs.

ANTONE SCHOTTLER ET ALS., RESPONDENTS.

CERTIORARI—MULTIFARIOUSNESS OF WRIT. Such objections are addressed wholly to the discretion of the Court.

OBJECT OF THE WRIT. In this proceeding the Court cannot take cognizance of things *in fieri*. The object of the writ is to annul, and not to restrain.

IDEM. The writ can be employed only to review the judgment of a court or board exercising judicial functions. The resolutions of the Water Commissioners, under the Act of March 27, 1876, in appointing appraisers, and the action of the Supervisors in approving the same, were simply ministerial or executive acts, and cannot be reviewed in such a proceeding.

IDEM—PARTIES. The Board of Appraisers, under said act, were the proper parties against whom the writ should be directed. The parties whose acts are the subject of review should be before the Court.

REPEAL OF STATUTE—VESTED RIGHTS. The Act of March 27, 1876, provided for the condemnation of water and water rights; and before the property was either taken or paid for, the act was repealed. No rights had vested by the action of the Board of Appraisers prior to such repeal, and the repeal annulled all proceedings had under the act.

Petition for writ of *certiorari*.

Robert Ash and *John F. Swift*, for petitioner.

Irvine & Hall, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

A motion to quash the writ of *certiorari* issued in this case has been argued and submitted. It is based on several grounds, one of which is that the petition for the writ is

multifarious. That it is, does not admit of argument. But that objection is addressed wholly to our discretion, and in the exercise of it in this case we have concluded not to grant the motion on that ground. If many pleaders would give more heed to the requirement of the Code, that "the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language," it would conduce greatly toward simplifying and facilitating judicial proceedings. The remedy for a departure from that rule, if strictly administered in every case, might aggravate rather than alleviate the evil. For that reason courts are compelled to tolerate violations of the rule, even in cases where there does not seem to be any excuse for not observing it. The writ which it is sought to have quashed is directed, in accordance with the prayer of the petition, to twelve persons, who are alleged to constitute the Board of Supervisors of the city and county of San Francisco, and to the Mayor, Auditor, and District Attorney of said city and county, who are alleged to compose the Board of Water Commissioners thereof, and to the County Clerk of said city and county.

This proceeding is instituted for the purpose of having this Court determine: (1) Whether the Board of Water Commissioners exceeded their jurisdiction in adopting a resolution, on the 21st day of December, 1877, to the effect that it was necessary for said city and county to acquire the Spring Valley Water Works, the Laguna de la Merced, and the San Mateo Water Works. (2) Whether said Board of Water Commissioners exceeded their jurisdiction in appointing James R. Kelly, Patrick Crowley, and J. L. Meares as appraisers on behalf of said city and county to appraise the values of said properties. (3) Whether said Board of Supervisors exceeded their jurisdiction in confirming, on the 15th day of December, 1879, said appointment. (4) Whether said persons so appointed as appraisers, and certain other persons selected by the owners of the Laguna de la Merced and by the County Judge of said city and county, exceeded their jurisdiction as a Board of Appraisers in making and filing, on the 22d day of December, 1879, an appraisement of the value of said Laguna de la Merced.

There are other acts and resolutions of said Boards of Supervisors and Water Commissioners set forth and referred to in said petition; but as, with a single exception, they are claimed by the petitioner to support his theory in regard to the invalidity of the acts above specified, we will only now notice the exceptional act, which is alleged to be a resolution, now pending in said Board of Supervisors. Upon well

settled principles we cannot in this proceeding take cognizance of things *in fieri*. The object of the proceeding is to annul, and not to restrain. For the latter purpose other writs have been provided.

The proceedings which are attacked by the petitioner rest for their sole authority upon an Act of the Legislature, approved March 27, 1876 (statutes 1875-6, page 501), and generally known as the Rogers Act. It constitutes the Mayor, Auditor, and District Attorney a Board of Water Commissioners with certain powers, among which are those which they are alleged to have exercised in excess of their jurisdiction. These acts consist of the resolution that it is necessary to acquire certain water rights, and the appointment of three persons to appraise the value thereof. The resolution amounts to nothing more than the expression of an opinion, and is not judicial in any sense. It was not necessary to adopt it before proceeding to appoint appraisers, and the validity of that appointment, or of any subsequent proceeding, in no wise depended upon the adoption of any such resolution. We have said that it was not judicial, and we may safely add that it was not even official. It is without force or effect, and no one can be interested in having it annulled or affirmed. The act of appointing appraisers cannot be reviewed in this proceeding. It was purely ministerial or executive; and even if it were not, and the appointment was without authority, the law has provided a "plain, speedy, and adequate remedy against any person who usurps, intrudes into, or unlawfully holds or exercises any public office." (C. C. P., 803.) Neither can the action of the Board of Supervisors, in approving the appointment of said appraisers, be reviewed in this proceeding. It was ministerial, or perhaps, more properly speaking, executive in its character.

The writ was prayed for against, and directed to, the County Clerk, as the custodian of the record of the proceedings of the Board of Appraisers. If the writ was properly issued, it was properly, if not necessarily, directed to him.

The writ was not prayed for as against, nor was it directed to, the Board of Appraisers, whose acts it is sought to have reviewed in this proceeding. If it was necessary to direct it to any of the boards or officers specified in the petition other than the County Clerk, it was necessary to direct it to the Board of Appraisers, in order to authorize a review of its proceedings, which, according to our view of the matter, are the only ones specified in the petition which we could review upon *certiorari*.

The provision that "the writ may be directed to the inferior board, tribunal, or officer, or other person having the custody of the record or proceedings to be certified," is not altogether free of ambiguity. It is our opinion, however, that the party or parties whose acts are the subject of review should be before the Court. And section 1071, C. C. P., seems to contemplate a service upon all whose proceedings are to be reviewed, by providing that they may be required to desist from further proceedings in the meantime.

But the petitioner maintains that the proceedings of this last named board, as well as of the other boards, have been annulled by competent authority. If, upon an examination of the facts which he alleges in support of this theory, we shall be led to the same conclusion, it will not be necessary or proper for this Court to proceed any further in the case. The proceedings upon *certiorari* are not in the nature of a *post mortem* examination. If there is nothing to annul, there is nothing for this Court to act upon in this proceeding. One allegation is, that on the 23d day of January, 1880, the Legislature of this State repealed the Rogers Act, "and ended and terminated all rights, authority, and powers under the same." In *Key* vs. *Goodwin*, 4 Moore & Payne, Mr. Justice Tindal said: "The effect of a repealing I take to be to obliterate the statute repealed as completely from the records of Parliament as if it had never passed, and that it must be considered as a law that had never existed, except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was an existing law." And in *Surtees* vs. *Ellison*, 4 Mann & Ryl, 586–588, Tenterden, C. J., said: "When an Act of Parliament is repealed, it must be considered the same as if it had never existed, except with reference to such parts as are saved by the repealing statute." Cowen, J., in *Butler* vs. *Palmer*, 1 Hill, 324, says that "such is undoubtedly the general rule." "The effects of the repeal," says Sedgwick, "when it is clear and absolute, are of a very sweeping character." (Sedgwick on the Construction of Stat. and Const. Law, 108.) "Because the Legislature, being in truth the sovereign power, is always of equal and always of absolute authority, it acknowledges no superior upon earth, which the prior Legislature must have been, if its ordinances could bind a subsequent Parliament." (Cooley's Const. Lim., 153.)

This principle, although modified by the constitutional inhibition against passing laws impairing the obligations of contracts, is, with that limitation, applicable to American legislation. In *Bloomer* vs. *Stally*, 5 McLean, 161, the Court

says: "There is no mode by which a legislative act can be made irrepealable, except it assume the form and substance of a contract."

We are limited by this motion to quash to the consideration of those facts, and those alone, set forth in the petition. We are, and necessarily must be, oblivious to any and all other facts. Now, if all the persons, officers, and boards who were authorized to act in the matter of acquiring water rights under the Rogers Act had proceeded in strict compliance with its provisions, and no attempt had been made by any of them to revoke or repeal any of their own acts, the petition shows that the last step taken by any of them previously to the repeal of the Rogers Act was the filing of the appraisers' report. Before another step was taken the act was repealed. If any rights had become vested under the original act, the repeal of it could not take them away. For instance, if the owners of the land in this case had received the appraised value of it before the repeal of the act, they could not successfully resist the right of the city and county to take possession of it, on the ground that such possession was not taken before the repeal of the act. And if the city and county had taken actual possession of the premises, and appropriated them to the uses contemplated by the act before its repeal, the right of the owners to compensation would not be affected by the repeal. In other words, complete performance by either party before the repeal would have created a vested right in favor of the party so performing, which no subsequent repeal could take away. The petition in this case does not show that upon either of these grounds any right under the act repealed vested in either party before its repeal.

San Mateo Water Works vs. *Sharpstein*, 50 Cal. 284, established the rule in this State that private property cannot be taken for public use until paid for. The taking and payment must be simultaneous acts. That rule is now firmly imbedded in the Constitution (Article I, section 14). It does not appear by the petition before us that the property has either been taken or paid for; and therefore it does not appear that there has been any performance on either side.

Upon facts analogous to those stated, as we understand them, there are several well-reasoned cases which hold that no right would vest under the circumstances which could be successfully prosecuted after the repeal of the act. To this effect is the case of *Hampton* vs. *Commonwealth*, 19 Pa. St. 329. In that case the Legislature of Pennsylvania provided for the extension of a public street, and that viewers should

ascertain and determine the damages and benefits to property owners within the district interested in the extension, and to so apportion them that the latter should pay the former; and that as soon as the report of the viewers was confirmed by the Court, *the extension henceforth should be deemed and taken to be a lawful public street.* The viewers made their report, and it was confirmed by the Court, and the confirmation was upon *certiorari* approved by the Supreme Court. The owners of the property taken for the purpose of the extension accepted, as they were authorized to do, the judgments and liens upon the property reported to be benefited as compensation for the property taken, and thereupon became entitled to process in the nature of a *scire facias* upon a mortgage for the collection of the amounts awarded them against those whose property had been benefited by the improvement. The action was prosecuted in the name of the Commonwealth for the use of Irwin and Tomlinson, who were entitled to damages against Hampton, who had been adjudged liable to pay for benefits. After all the above steps had been taken, with the exception of the issuing of the *scire facias*, the act providing for the extension was repealed, and the *scire facias* was sued out after the appeal. The plaintiff obtained judgment, from which an appeal was taken to the Supreme Court. In the opinion delivered by Black, C. J., the effect of the repeal of the act before the *scire facias* issued is the only question considered, from which we infer that there was none other involved in the case. He says: "This transaction is put by the Court of Common Pleas on the footing of a contract between the parties. There is no definition of a contract that will include it. The State takes private property for public use in virtue of her right of eminent domain. She is bound to pay for it; but, instead of making compensation out of the public treasury, she in this case ordered it to be assessed on contiguous property, and this was an exercise of the taxing power. It was all done by one Act of the Legislature, and that act was repealed—the part which authorizes the taking of the property, the portion which gives the right of compensation, and that which imposes the tax. The last was as clearly repealed as the rest." And he concludes as follows: "The repeal of the law at any time before the street was opened rendered all the proceedings under it void from the beginning. It is as if no such law had ever passed. If the repeal had come after judgment rendered and after execution issued, it would have struck dead the process in the hands of the Sheriff."

In *Butler* vs. *Palmer*, 1 Hill, 324, Cowen, J., delivering the opinion of the Court, says: "The amount of the whole comes to this—that a repealing clause is such an express enactment as necessarily divests all inchoate rights which have arisen under the statute which it destroys. These rights are but an incident of the statute, and fall with it, unless saved by express words in the repealing clause. I know," he continues, "that rights of action and other executory rights arising under a statute are said to be vested. (*Couch* vs. *Jeffries*, 4 Burr, 2462; and *vide Beadleston* vs. *Sprague*, 6 Johns. R. 101.) They are so, and a subsequent statute ought not to repeal them, though it may do so by express words, unless they amount to a contract within the meaning of the Constitution. But that being out of the way, and the statute being simply repealed, the very stock on which they were engrafted is cut down, and there is no rule of construction under which it can be saved."

Harrington vs. *The County Commissioners of Berkshire*, 22 Pick. 363, is sometimes cited in support of the opposite doctrine. But that case did not involve the question of the effect of the repeal of a statute under which the highway had been laid out and the damages awarded. The local authorities, after proceeding that far, voluntarily abandoned the project. It was held under those circumstances that the owner was entitled to an order from them for the payment of his damages. *The People* vs. *The Supervisors of Westchester County*, 4 Barb. 64, is more nearly in point, and militates to some extent against the doctrine laid down in *Hampton* vs. *The Commonwealth* and *Butler* vs. *Palmer*, *supra*. In *The People* vs. *The Supervisors*, *supra*, Barculo, J., says, in one part of his opinion: "Now, as I view this subject, when the Supervisors liquidated the amount of damages, the relators obtained a vested right to the sums awarded to them respectively." In another part of his opinion he lays some stress on the fact that the relators had removed their fences under the direction of commissioners appointed for that purpose, before the repeal of the act. He admits that several cases seem to support the doctrine to some extent that the Legislature may change its intentions before the land is actually taken, and thus deprive the owner of the sum awarded him for damages. It was however held, in *Williams* vs. *County Commissioners*, 35 Me. 345, that the repeal of an act which authorized a course of proceedings by a public officer invalidated the proceedings, if unfinished, at whatever stage they had arrived. This is recognized as the prevailing

doctrine in *Tivey* vs. *The People*, 8 Mich. 128, and in numerous other cases.

As we have seen, this repeal effectually annulled all proceedings had under the act repealed, unless the obligation of a contract would thereby be impaired, or a vested right destroyed. If no such obligation or right had arisen under the act prior to its repeal, then this case must be treated as it would be if the act had never existed. Upon this point no court or commentator has ever suggested a doubt.

A brief examination of the provisions of the act will be sufficient, we think, to satisfy any one who has a clear conception of what constitutes a contract or creates a vested right that neither exists in this case. The act provided for the taking of private property for public use. When in the exercise of its sovereign right of eminent domain the State takes the private property of a person, he has but one right, and that is given to him by the Constitution—the right to compensation before he is deprived of his property. The right to take his property in no sense depends upon any contract between him and the public. His assent is not required, and his protestations are of no avail. But under the Constitution his property cannot be taken until paid for. Up to that time he holds it as he always held it, subject to the right of the State to take it for public use upon compensating him for it. When so taken, the right to compensation which the Constitution gives him accrues. That right, then, for the first time would become under the Constitution a vested one. Up to that time he parts with nothing, and the public receives nothing. Prior to that time no lien is impressed upon his property or cloud cast upon his title in consequence of any preliminary proceedings. "Nor indeed can it be said in any legal sense that the land has been taken until the act has transpired which divests the title or subjects the land to the servitude. So long as the title remains in the individual, or the land remains uncharged by servitude, there can have been no taking under conditions which, as already stated, preclude the commission of a trespass. * * Until the price has been ascertained, the Government is not in a position to close the bargain; and when it is ascertained, if the sum is not satisfactory, the Government may withdraw. The Government is under no obligation to take the land if the terms when ascertained are not satisfactory." (*Fox* vs. *W. P. R. R. Co.*, 31 Cal. 538.)

We know of no method by which the Government could have expressed its dissatisfaction with the price fixed upon

the Laguna de la Merced more plainly and positively than by the repeal of the act which provided for its acquisition; and that, too, before any step subsequent to the ascertainment of the price had been taken. It is obvious that the public had acquired no new right under these proceedings before the repeal of the act, and quite as clear that the owners of the property had not. Their right to compensation depended wholly upon the property being taken, and not upon any contract or obligation of the public to take it. And the repeal of the act divested the officers, whose sole authority to proceed in the matter rested upon it, of any power to either take or pay for the property. The facts set forth in the petition lead irresistibly to this conclusion, and it would therefore be idle for the Court to attempt to reannul that which has already been annulled by competent authority.

Having arrived at this conclusion, it is unnecessary to consider any of the other grounds upon which it is urged that the writ should be quashed.

The motion to quash the writ is granted.

We concur: McKee, J., Myrick, J., Ross, J. I concur in the judgment on the ground last discussed in the opinion: Thornton, J. I concur in the judgment quashing the writ: Morrison, C. J.

CONCURRING OPINION.

I concur in the order. I agree that it is not the office of *certiorari* to stay the passage of a resolution introduced and *now pending* in the Board of Supervisors, and that neither the act of the Commissioners in appointing appraisers, nor of the Supervisors in ratifying the appointment, was a judicial act; and that *certiorari* can be employed only to review the judgment or determination of a court, board, or officer exercising judicial functions. (C. C. P., page 1068; *The S. V. W. W.* vs. *Bryant*, 52 Cal. 132.) The petition, therefore, contains no averment which can justify the issue of the writ as against the parties who are made respondents in this proceeding. It is not claimed that the County Clerk has been named a party for any other reason than because he is the immediate custodian of the record. But whatever be the mode of *service*, the judgment attacked cannot be *annulled or modified* unless the tribunal or officer by whom it was rendered has been made a *party*. The officer, indeed, may have no personal interest in sustaining his judgment or order, but the duty is imposed upon him of protecting his jurisdiction; and if he be denied a hearing he may be shorn of his powers, if not by collusion yet by the failure to present the question as forcibly as it might have been presented.—MCKINSTRY, J.

DEPARTMENT No. 1.

[Filed March 18, 1880.]

[No. 6030.]

CHARLES L. DINGLEY ET AL.

VS.

ANNE E. GREENE ET AL.

MECHANICS' LIEN—WHEN IT WILL NOT ATTACH—SECTIONS 1183 AND 1192, AS AMENDED IN 1874, CONSTRUED. Where the owner had made payments to the contractor in good faith under and in pursuance of the contract, before receiving notice, either actual or constructive, of the liens, the material men and laborers cannot charge the building with liens exceeding the balance of the contract price remaining unpaid when the notice of the lien was given. (*Renton* vs. *Conley*, 49 Cal. 185; *Wells* vs. *Cahn*, 51 Cal. 427, cited and approved.)

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

W. Van Dyke, T. V. O'Brien, C. P. Goff, L. S. Clark, for respondents.

McAllister & Bergin, for appellants.

McKEE, J., delivered the opinion of the Court:

This is a suit which includes several actions consolidated into one, to recover judgment against the defendant, McMeekan, for the sum of $4,784.71, and to enforce mechanics' liens as security for its payment, upon the premises described in the complaint as the property of the defendant Greene.

It appears by the record that on the 22d day of September, 1875, the defendant McMeekan made a contract with his co-defendant Greene to build for her several houses upon her land in the city of San Francisco for the sum of $24,000, payable in nine installments, from time to time, as the work progressed; and it was part of the contract that the houses were to be completed on or before the 11th day of February, 1876; that McMeekan was to furnish all labor and material necessary and proper to finish the work, and if he failed to complete the buildings within the time stipulated, he was to forfeit $35 a day for every day over the contract time. McMeekan commenced the work and worked upon the houses until November 12, 1875, when he abandoned the contract, after having received five installments of the contract price, and absconded from the State, leaving the plaintiffs and others as his material men and workmen unpaid. To complete the work thus abandoned, the owner on the 3d December, 1875, made a contract with other contractors for the sum of $10,800.

The houses were finished by the last contractors, and within thirty days after they were completed the plaintiffs and others filed liens which they seek in this action to foreclose.

By part 3, title 4, chapter 2, of the Code of Civil Procedure, the principal and subsidiary contractors in a building contract, who by their skill, labor, or materials, create or improve the property of another, are entitled to a lien upon the property itself to secure payment of the value of the services, or the materials furnished, within the limits of the price as fixed by the contract between the owner and the original contractor. Liens to that extent may be filed by the original contractor and his employees; but for the creation and attaching of such liens performance of the work is a condition precedent. If the contract is an entirety, no liens can be filed from time to time as the work progresses, or for partial performance. (*Cox* vs. *W. P. R. R. Co.*, 44 Cal. 18.) Liens must be filed within thirty days after the completion of the building, and they are enforceable only to the extent of the money due upon the contract made by the original contractor and according to its terms. (*Dore* vs. *Sellers*, 27 Cal. 238; *Blythe* vs. *Pulteney*, 31 Cal. 233.) If the original contractor fails to perform his contract, or if he has performed it in part, and there is no money due to him according to its terms, or if, having performed it, he has been fully paid by the owner of the property according to the contract, before notice of the lien, neither he nor his employees is entitled to enforce a lien upon the property.

In *Renton* vs. *Conley*, 49 Cal. 185, the late Supreme Court, in construing the Act of March 30, 1868, held that, notwithstanding the broad language of the statute, where the owner had made payments to the contractor in good faith, under and in pursuance of the contract, before receiving notice, either actual or constructive, of the liens, the material men and laborers could not charge the buildings with liens exceeding the balance of the contract price remaining unpaid, when notice of the lien was given. (*McAlpin* vs. *Duncan*, 16 Cal. 127; *Bowen* vs. *Aubray*, 22 *Id.* 571.) And it was decided in *Wells* vs. *Cahn*, 51 Cal. 424, that sections 1183 and 1192 of the Code of Civil Procedure (as amended in 1874) wrought no change, in that respect, in the Act of 1868.

Therefore, if there is no existing lien on the original contract, none exists on the subsidiary contract. The liens to secure the latter are wholly dependent on that of the former. The contracts of material men and workmen with the original contractor are made with reference to his contract with the owner, and in subordination to its terms. (*Henley* vs. *Wads-*

worth, 38 Cal. 356.) When, therefore, the original contractor in this case abandoned his contract after partial performance, there was nothing upon which the lien of the plaintiffs could attach, unless there was something due by the owner upon the contract for the work which the contractor had done. But, according to the indisputable evidence in the case, there was nothing due by the owner at the time of the abandonment, because he had paid all of the installments of the contract price due at that time. These payments were made upon certificates of the architect of the buildings, whose duty it was to certify that the several installments of the contract price had become due, according to the terms of the contract, before payments could be made. It is true that the original contractor had to satisfy the architect that all materials furnished by him for the construction of the buildings, and all the work of the mechanics, laborers, or others employed by him had been paid, before he was entitled to the certificate, so that no liens could be filed upon the buildings; and the Court below finds that the architect, at the time he gave his certificate to the original contractor, knew that the material men and workmen had not been paid. But there is no finding that the owner knew that fact, nor is it charged that she did. Whatever faithlessness there may have been on the part of the architect in giving his certificates to the contractor, it cannot affect or prejudice the good faith of the owner in making her payments upon the faith of those certificates, for it was the mode of payment which had been agreed upon; and not only is the original contractor bound by his contract, but the material men and workmen are also presumed to have had notice and knowledge of the terms of it, and of the rights and obligations of the parties thereto. (*Shaver* vs. *Murdock*, 36 Cal. 293.)

There is nothing in the contract or the Mechanics' Lien law which required the architect to give notice of his decision that the contractor was entitled to his certificates. Such a provision, if it existed in the law, might afford some protection to those who have to do with dishonest contractors; but in the absence of such a provision, the certificate of the architect must be considered as conclusive of the rights of the parties under the contract, unless it can be shown that it was obtained by the owner by collusion, or fraud, or mistake. But there is nothing in the record to show that she acted otherwise than *bona fide* in making her payments upon the certificates. There is no evidence whatever tending to show collusion or fraud between her and the architect or the contractor.

As therefore the owner had strictly complied with her contract, and there was nothing due upon it from her to the contractor for the work which had been performed by him when he abandoned it, his employees have no liens under the law which can attach to the buildings after they were completed by other contractors, unless the buildings were completed by the creditors of McMeekan in performance of McMeekan's contract, or by the owner for their benefit. It is not claimed that the creditors of the original contractor completed the buildings, but the Court below finds: "That after the absconding of the said McMeekan, and before the completion of the buildings mentioned herein, one Richard McCann, by the consent of the parties to these actions, was substituted for said McMeekan as the contractor of the defendant Greene, upon the same terms and conditions as in the contract with defendant McMeekan, and that thereupon said McCann fully completed said buildings in accordance with the contract with defendant McMeekan as aforesaid; and that upon the completion of the said buildings, McCann received from the owner Mrs. Greene, the sum of $10,800 according to his said contract."

We cannot find in the record any evidence to sustain this finding. There is nothing, indeed, tending to show that the owner knew of or consented to any arrangement whatever to complete the buildings for the benefit of the absconding contractor or his creditors; and there could not be a substituted performance without her knowledge and consent. (Civil Code, sec. 1532.) Upon that subject the testimony of the witnesses is all one way. McCann, the last contractor, says: "I refused to contract with the McMeekan creditors to complete the buildings." Townsend, the architect, says: "Mrs. Greene had never given any orders to have the creditors go and finish the house. * * * She had nothing to do with it at all." Mrs. Greene, the owner of the buildings, says: "I never agreed at any time with any of the creditors of McMeekan to let them go on and complete the buildings according to contract; nor did I ever authorize any one to make such a contract or arrangement on my behalf. * * * I made the contract with the McCanns for the completion of the buildings. I made that contract with the McCanns of my own motion, without any connection with any of the creditors of McMeekan, and not as part of any arrangement with any of them. It was not as part of any arrangement with any of the creditors of McMeekan." Hawkins, the agent of Mrs. Greene, says: "The completion of these buildings was not made by any agreement or under any arrangement with McMeekan."

These are the only witnesses upon the subject, and their evidence conclusively shows that the buildings were completed by Mrs. Greene upon her own responsibility, and without any privity or concurrence on the part of the McMeekan creditors. That being the case, the plaintiffs in these actions, who were creditors of the absconding contractor, have no liens which can be enforced against her.

Judgment and order denying a new trial reversed, and cause remanded.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed March 13, 1880.]

[No. 6313.]

E. WHITING, RESPONDENT,

vs.

T. M. QUACKENBUSH, APPELLANT.

STREET ASSESSMENT—VENUE. Laying the *venue* in the caption of the assessment is sufficient to show that the property charged is situated within the jurisdiction of the Superintendent of Streets.

IBID—DESCRIPTION OF LOT. Where the assessment and diagram exhibit the streets on which the work has been done, the lot designated by its number, and the number of its feet front on the street, and the depth of its side lines and also a *scroll* representing the direction of the streets, the description of the lot is sufficient.

IBID—CONSTITUTIONALITY OF ASSESSMENT LAWS—EQUAL AND UNIFORM APPORTIONMENTS. The front foot system of apportionment is constitutional and valid. (*People* vs. *Lynch*, 57 Cal. 15, construed.)

Appeal from the District Court of the Twenty-third Judicial District, San Francisco County.

Pringle & Haynes, for appellant.

C. H. Parker, for respondent.

McKEE, J., delivered the opinion of the Court:

This is an appeal from a judgment of foreclosure of the lien of a street assessment upon a lot or land in the city of San Francisco.

It is contended that the judgment is erroneous, because the assessment does not show that the property or the streets represented upon it are within the city of San Francisco; because it does not show a sufficient description of the property, and because the law, under which the assessment has been made, is not equal and uniform, and therefore is unconstitutional and void.

First. The Superintendent of Public Streets, Highways,

and Squares of the city and county of San Francisco has certified the assessment from the book of the record of assessments in his office, and the caption at the head of the assessment shows that it was made in the city and county of San Francisco.

A venue in the margin of a pleading is held to be sufficient. (*Hicks* vs. *Walker*, 2 Green's Iowa Reps.; *Cocke* vs. *Kendall*, 1 Hempstead, 393.) And where there are several facts, the venue stated as to the first will apply to all the matter which follows it. (*Skinner* vs. *Gunton*, 1 Saund. 229.) Laying the *venue* in the caption of the assessment is, therefore, sufficient to show that the property sought to be charged is situated within the jurisdiction of the Superintendent of Streets of the city and county of San Francisco.

Second. An assessment for a street improvement must contain a description of the property upon which a lien is claimed. In *Himmelman* vs. *Cahn*, 49 Cal. 296, no courses were represented on the diagram of the assessment. In *Himmelman* vs. *Bateman*, 50 Cal. 11, the same defect existed, and the figure which indicated the depth of the side lines of the lot on the original diagram were omitted from the diagram as recorded; and in *San Francisco* vs. *Quackenbush*, 53 Cal. 52; and *Norton* vs. *McCourteney*, vol. 691, there was nothing on the diagram to distinguish the meridian; and the description in each of those cases was held to be insufficient. But in this case the assessment and diagram exhibit the streets on which the work has been done, the lot itself as designated by its number, the number of its feet front on the street and the depth of its side lines, and also a scroll representing the direction of the streets. The point of a scroll is as competent as the barb of an arrow to denote north on a map or a diagram. Indeed, any peculiarity of shape or color is sufficient for that purpose. So that the Court is enabled to read from the diagram that Tyler Street lies northerly, and runs parallel with McAllister Street, and that both of them run easterly and westerly; and that Polk Street runs at right angles with the latter streets. These are streets of the city as designated on the official plan or map of the city, of which the Court is bound to take judicial notice. (Stat. 1858, pp. 52–56.) The description of the lot is therefore insufficient.

Third. The front foot system, which is the system of apportionment adopted for assessments for the public improvement of streets in the city of San Francisco has not been declared unconstitutional in the case of the *People* vs. *Lynch*, 51 Cal. 15. On the contrary, that system was upheld

and maintained as a standard of apportionment by the Supreme Court in that case; for the reasoning of the Court is: That every tax must be levied with equality and uniformity under some system of apportionment; an assessment for improving a street in a city is a tax; therefore every assessment must be levied with equality and uniformity. But if it be so levied under a system which apportions it with reference to the number of feet fronting on the improvement, or to any other standard which will approximate equality and uniformity, it is not void for want of equality and uniformity. In that case the Court had to deal with the fact that, in levying the assessment, a lot of land, within the district declared to be benefited, was not assessed at all; and in consequence thereof, the entire expense of the improvement was assessed upon the remaining lots. And it was held that the omission of the lot from the assessment disturbed the equality and uniformity of the levy, and rendered the assessment void; but that did not result from the assessment itself, but from the application of the system to the local improvement. No such disturbing cause exists in this case, and the assessment is valid.

Judgment affirmed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT NO. 1.

[Filed March 18, 1880.]

[No. 6261.]

WILLIAM PAYNE

vs.

F. A. ELLIOTT AND WM. R. COOPER.

TROVER—ACTION WILL LIE FOR SHARES OF STOCK. Shares of stock *eo nomine* are property for which an action in the nature of an action of trover can be maintained.

PLEADING—FRAUD. The facts upon which a charge of fraud is based must be specifically alleged in the complaint.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Hudson & Veniable, for appellant.

L. Quint, for respondent.

McKEE, J., delivered the opinion of the Court:

This is an action of trover. The plaintiff seeks to charge defendants with $2,796.32 and costs, for an alleged conversion of one hundred shares of the stock of the Northern

Belle Mill and Mining Company, and also to have them adjudged guilty of fraud. The complaint was demurred to on several grounds, and the demurrer overruled. Defendants afterwards answered; and upon a trial had in the absence of defendants and their attorneys, the Court gave judgment for the plaintiff for the amount sued for, in gold coin, and also adjudged that the defendants were guilty of fraud. The appeal comes to this Court upon the judgment roll, and the appellants claim that the lower Court erred in overruling defendants' demurrer to the complaint, upon the grounds that there is no allegation that the plaintiff owned, or that the defendants converted, any *certificates* of shares of stock; and that the allegation of fraud is insufficient to sustain the judgment that the defendants were guilty of fraud in the supposed conversion. The principal question is, whether shares of stock *eo nomine* are property for which an action, in the nature of an action of trover, can be maintained.

At common law, trover was the proper remedy for a conversion of personal property; but it lay only for tangible property, capable of being identified and taken into actual possession. The conversion of the property was the gist of the action; and the action did not lie, unless the defendant had become actually possessed of the property by some means, whether of finding or otherwise. Shares of stock, and such things, did not belong to that class of property known as chattels; they were considered incorporeal, intangible things, which existed in idea, and were incapable of being subjected to actual possession. Nor were they supposed to denote possession; for they had no other evidence of an existence than the certificate which was issued to the person who claimed the right to what the certificate represented. That right consists of the privilege of voting in the concerns of the corporation, and of participating in the profits of the business of the corporation. It subsisted only in law or contract. It was a right to a thing not in possession, but in action. The certificates themselves were not considered property, but were considered evidence of property. Wherever common law ideas of personal property prevail, courts hold that trover is not the proper remedy for the conversion of things which were considered at common law as mere personal rights, not reducible into possession, but recoverable by law. So the Supreme Court of Pennsylvania has held that trover will not lie to recover damages for shares of bank stock; and says Justice Sharswood, "the principle applies to all other corporation stocks." A share of stock, says the Court, is an incorporeal,

intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive, in the meantime, such profits as may be made and declared in the shape of dividends. Trover can no more be maintained for a share in the capital stock of a corporation, than it can for the interest of a partner in a commercial firm. (*Neiller* vs. *Kelly*, 69 Penn. 407.)

Upon the idea that shares of stock cannot be taken away or wrongfully detained from the owner, or that they cannot be lost by the owner or found by a stranger, there is no doubt of the soundness of that decision. But the fiction on which the action of trover was founded—namely, that a defendant had found the property of another which was lost—has become, in the progress of law, an unmeaning thing which has been by most courts discarded; so that the action no longer exists as it did at common law, but has been developed into a remedy for the conversion of every species of personal property. It lies for bank notes sealed in a letter (*Moody* vs. *Keeney*, 7 Ala. 218); for negotiable instruments (*Comparet* vs. *Burr*, 5 Black, 419); for a judgment (*Hudspeth* vs. *Wilson*, 2 Dev. N. C. 372); for a promissory note which has been paid (*Pierce* vs. *Gibson*, 9 Vt. 216); for copies of a creditor's account (*Fulton* vs. *Cunningham*, 16 Vt. 697); for a writ of execution issued on a judgment (*Keeler* vs. *Fasset*, 21 Vt. 539); and for *certificates* of shares of stock (*Anderson* vs. *Nicholas*, 28 N. Y. 600; *Atkins* vs. *Gamble*, 42 Cal. 98; *Von Schmidt* vs. *Bourne*, 50 *Id.* 616).

At the same time that the action has been thus expanded, the words "things in action" have undergone such a development from their original meaning that they now represent things to the imagination in the light of tangible objects; and as such, they are the subject of contract, sale, gift, mortgage, bailment, and pledge; and under the provisions of our Codes, they are personal property, subject to taxation, attachment, execution, levy, and sale. (Sections 542–688, C. C. P.)

It is therefore the "shares of stock" which constitute the property which belongs to the shareholder. Otherwise the property would be in the certificate; but the certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation, without the issuance of a certificate, vests title in the shareholder. The certificate is therefore but additional evidence of title; and if trover is maintainable for the certificate, there is no valid reason why it is not also maintainable for the thing itself which the certificate represents. For, as the Supreme

Court of Connecticut says: "If a certificate of stock is unlawfully retained when demanded, what is presumed to have been converted? The certificate has no intrinsic value disconnected from the stock it represents. No one would say that the paper alone had been converted—that the conversion of the paper constitutes the entire wrong. The real act done in such cases is precisely the same as that done here—no more, no less—and to say that trover will lie in one case and not in the other, is to make a distinction where in reality there is no difference. * * * The stock in both cases was converted; and we think that in these days, when the tendency of courts is to do away with technicalities not based upon reason, a technical distinction of this character should no longer be sustained." (*Ayres* vs. *French*, 41 Conn. 151.) In *Boylan* vs. *Hangle*, 8 Nev. 352, and in *Kuhn* vs. *McAllister*, 1 Utah, 275, actions of this character for "shares of stock" were sustained. It follows that the Court below did not err in overruling the demurrer to the complaint, or in rendering judgment for the plaintiff for the value of the stock and interest thereon from the time of the conversion until the time of the trial.

But the judgment for fraud exceeds the relief to which the plaintiff was entitled by his complaint; for the only averments upon the subject of fraud are: "That the defendants received said shares of stock in a fiduciary capacity as the agents of this plaintiff, and not otherwise;" and "That defendants were and are guilty of fraud in receiving and converting said stock to their own use." It is not altogether clear how a person is chargeable with fraud by receiving shares of stock in a fiduciary capacity; for, as the term "fiduciary" imports, the defendants must have received them rightfully to hold in trust for the plaintiff. But if the defendants, as trustees of the plaintiff, fraudulently converted the stock to their own use, the facts, which constituted the imputed fraud, should have been stated; for fraud is never presumed, but must be proved; and to be proved, the facts upon which the charge is based must be specifically alleged in the complaint. (*Davis* vs. *Robinson*, 10 Cal. 412.)

Without any issuable averments upon the subject, the Court finds "that the defendants were the agents of the plaintiff; that the plaintiff delivered the stock to them to hold as security for the payment of $409 which he owed to them, and that they received it in the course of their employment as such agents and in a fiduciary capacity." Upon these findings the Court "adjudged the defendants guilty of having fraudulently misapplied and converted said one hun-

dred shares of the capital stock of the Northern Belle Mill and Mining Company to their own use, and that the defendants be arrested and held in custody until they pay the amount of this judgment, or until they shall otherwise be legally discharged from custody." The judgment to this respect is not warranted by the case stated in the complaint or the findings.

Some time after the judgment had been rendered, the Court below undertook, by an order entered upon the minutes of the Court, to modify it by "striking out the last six lines therein;" but that does not cure the error. The judgment convicting the defendants of fraud and ordering their arrest should be vacated.

It is hardly necessary to remand the cause for a new trial for that purpose, but the Court below is directed to strike from the judgment the following matter, viz.: "And that plaintiff is entitled to an order of arrest against said defendants until the same shall be paid. * * * And it is further ordered, adjudged, and decreed that defendants were the agents of the said plaintiff, and that they received 100 shares of the capital stock of the Northern Belle Mill and Mining Company of the value of $2,950. That they received the same as the agents of the said plaintiff, and in a fiduciary capacity, and refused to deliver the same to plaintiff on demand; and that they, the said defendants, converted the same to their own use, and against the will or consent of said plaintiff, by reason of which they are hereby adjudged guilty of fraud. And it is further ordered, adjudged, and decreed that said defendants be arrested and held in custody until they pay the amount of this judgment, or until they otherwise legally be discharged from custody."

Thus modified, the judgment is affirmed.

We concur: Ross, J., McKinstry, J.

Abstract of Recent Decisions.

OREGON SUPREME COURT.

ISSUES OF FACT. Where there are several issues of facts to be tried by a jury, it is not error to admit any evidence, however slight, which tends to prove any fact so put in issue.—*Elkins* vs. *Parrish*, February 16, 1880.

CONSTRUCTION OF WILL. Where the will of a testatrix properly executed refers to the will of her late husband, and so describes it as to leave no doubt of its identity, and adopts the provisions therein contained: *Held*, that it becomes a part of such will, and

should be considered in construing its provisions.—*Gerrish* vs. *Gerrish*, February 16, 1880.

SAME. It appearing that the provisions of the will of James Gerrish are supposed to be adopted and made a part of the will of the testatrix under consideration for construction in this case: *Held*, that the children and grandchildren of the testatrix are named and provided for within the meaning of the statute. —*Id.*

CONSTRUCTION OF STATUTE. When the statute of another State is adopted in this State, we must look principally to the decisions of that State to ascertain its proper judicial construction. —*Id.*

PARENT AND CHILD. The object of the statute is not to compel parents to make actual beneficial provisions for their children and their descendants; it exists to prevent the consequences of forgetfulness or oversight, and to prove an intestacy only when the child or descendants of such child is unknown or forgotten, and thus unintentionally omitted.—*Id.*

Book Notices.

PRINCIPLES OF CRIMINAL LAW. By SEYMOUR F. HARRIS, B.C.L., M.A. (Oxon.), Barrister-at-Law, of the Inner Temple and of the Northern Circuit; with Additions and Notes adapting it to the American Law, by M. F. FORCE, Professor of Equity and Criminal Law in the Cincinnati Law School. Cincinnati: Robert Clarke & Co., 1880.

The author says this work is designed to meet the requirements of students and young practitioners. As a general introduction to criminal law and criminal procedure, there can be no better work. The author has judiciously and skillfully selected from the overwhelming mass of criminal law just so much as the student and young practitioner should learn. The work will be favorably received.

THE LAW AND PRACTICE OF COURTS OF PROBATE, under the Statutes and Decisions of the Supreme Courts of Wisconsin and Minnesota. By GEORGE GARY, County Judge of Winnebago County, Wisconsin. Chicago: Callaghan & Co., 1879.

This work, as the title shows, is local, being specially applicable to the Probate practice in the States of Minnesota and Wisconsin.

Circuit Court of the United States,

In and for the Ninth Judicial Circuit, District of California.

IN RE TIBURCIO PARROTT ON HABEAS CORPUS.

1. TREATY-MAKING POWER. Under section 10, Article I, of the Constitution of the United States, and section 2, Article II, the treaty-making power has been surrendered by the States to the National Government, and vested in the President and Senate of the United States.
2. TREATIES, EFFECT OF. Under Article VI, the Constitution of the United States and laws made in pursuance thereof, and treaties made under its authority, are the supreme law of the land; and the judges in every State, both State and National, are bound thereby, anything in the *Constitution or laws* of any State to the contrary notwithstanding.
3. CHINESE TREATY WITHIN TREATY-MAKING POWER. The provisions of Articles V and VI of the treaty with China of June, 18, 1868, recognizing the right of the citizens of China to emigrate to the United States for purposes of curiosity, trade, and permanent residence, and providing that Chinese subjects residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel and residence as may be enjoyed by the citizens or subjects of the most favored nations (16 Stat. 740), are within the treaty-making power conferred by the Constitution upon the President and Senate, and are valid, and constitute a part of the supreme law of the land.
4. CONSTITUTION OF CALIFORNIA—TREATY. Any provision of the Constitution or laws of California in conflict with the treaty with China is void.
5. SECTION 2 OF ARTICLE XIX OF THE CONSTITUTION OF CALIFORNIA, providing that no corporation formed under the laws of the State shall, directly or indirectly, in any capacity, employ any Chinese or Mongolian, and requiring the Legislature to pass such laws as may be necessary to enforce the provision, is in conflict with Articles V and VI of said treaty with China, and is void.
6. ACT MAKING IT AN OFFENSE TO EMPLOY CHINESE. The Act of February 13, 1880, to enforce said article of the Constitution making it an offense for any officer, director, agent, etc., of a corporation to employ Chinese, violates the treaty with China, and is void.
7. THE PRIVILEGES AND IMMUNITIES, which, under the treaty, the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nation, are all those rights which are fundamental, and of right belong to citizens of all free governments; and among them is the right to labor, and to pursue any lawful employment in a lawful manner.
8. LABOR—PROPERTY. Property is everything which has an exchangeable value. Labor is property, and the right to make it available is next in importance to the right to life and liberty.
9. FOURTEENTH AMENDMENT TO NATIONAL CONSTITUTION. The provisions of Article XIX of the Constitution of California, and said Act of the Legislature passed to enforce it, prohibiting the employment of Chinese, are also in conflict with the provisions of the Fourteenth Amendment to the Constitution of the United States, and are void on that ground.
10. SAME. Said provisions are in conflict with that part of the said Fourteenth Amendment which provides that no State shall deprive any person of life, liberty, or property, without due process of law.

11. SAME. They are also in conflict with that portion of said amendment which provides that no State shall deprive any person within its jurisdiction of the equal protection af the laws.
12. CHINESE OR MONGOLIANS residing within the jurisdiction of California are "persons" within the meaning of the term as used in the said Fourteenth Amendment to the Constitution.
13. SECTIONS 1977 AND 1978 OF THE REVISED STATUTES OF THE UNITED STATES were passed in pursuance of said Fourteenth Amendment, and to give it effect; and said constitutional and statutory provisions of the State of California are in conflict with said provisions of the Revised Statutes.
14. DISCRIMINATING LEGISLATION by a State against any class of persons, or against persons of any particular race or nation, in whatever form it may be expressed, deprives such class of persons, or persons of such particular race or nation, of the equal protection of the laws, and is prohibited by the Fourteenth Amendment.
15. THIS INHIBITION OF THE FOURTEENTH AMENDMENT UPON A STATE applies to all the instrumentalities and agencies employed in the administration of its government; to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities.
16. POWER OVER CORPORATIONS. Where the State legislation, under its reserved power to alter and repeal charters of corporations, comes in conflict with valid treaty stipulations, and with the Constitution of the United States, it is void.
17. SAME. Where the policy of State legislation, under its reserved power to alter or repeal charters of corporations, does not have in view the relations of the corporations to the State as the object to be effected, but seeks to reach the Chinese and exclude them from a large field of labor, the ultimate object being to drive them from the State, in violation of their rights under the Constitution and treaty stipulations—the discriminating legislation being only the means by which the end is to be attained—the end sought is a violation of the Constitution and treaty, and the legislation as such is void.
18. UNLAWFUL OBJECT. Where the object sought is unlawful, it is unlawful to use any means to accomplish the object.
19. UNCONSTITUTIONAL ACT. That which cannot be constitutionally done directly, cannot be done indirectly.
20. SECTION 31, ARTICLE IV, OF THE CONSTITUTION OF CALIFORNIA, which provides that all general laws passed for the formation of private corporations may be altered from time to time, or repealed, does not authorize the Legislature to forbid the employment by corporations of persons of a particular class or nationality.—(HOFFMAN, D. J.)
21. CONSEQUENCES OF A PERSISTENT VIOLATION OF TREATIES BY A STATE DISCUSSED, and attention called to the stringent criminal laws passed by Congress to enforce the Fourteenth Amendment.

Before SAWYER, Circuit Judge, and HOFFMAN, District Judge.

Hall McAllister, Delos Lake, and *T. I. Bergin,* for petitioner.

A. L. Hart, Attorney-General; *David L. Smoot,* State Distric Attorney; *Crittenden Thornton, Davis Louderback, and Robert Ash,* for respondent:

[The judgment of the Court was announced by SAWYER, Circuit Judge, who stated that on a subsequent day he would file his opinion. (For opinion, see p. 19.) HOFFMAN, District Judge, then delivered the following opinion.]

HOFFMAN, District Judge: The return in this case shows that the petitioner is imprisoned for an alleged violation of an Act of the Legislature of this State, approved February 13, 1880.

Article XIX, section 2, of the recently adopted Constitution of this State is as follows:

"No corporation now existing, or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolians. The Legislature shall pass such laws as shall be necessary to enforce this provision."

In pursuance of this mandate the Legislature enacted the law under which the petitioner has been arrested. It is as follows:

"An Act to amend the Penal Code by adding two new sections thereto, to be known as Sections 178 and 179, prohibiting the employment of Chinese by corporations.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. A new section is hereby added to the Penal Code, to be numbered Section 178.

"SEC. 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee, or contractor of any corporation now existing, or hereafter formed under the laws of this State, who shall employ in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail of not less than 50 nor more than 500 hundred days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty under this section who refuses to assent to such employment, and has such dissent recorded in the minutes of the Board of Directors.

"1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:

"2. For each subsequent conviction such person shall be fined not less than $500 nor more than $5,000, or by imprisonment not less than 200 days nor more than two years, or by both such fine and imprisonment.

"SEC. 2. A new section is hereby added to the Penal Code, to be known as Section 179, to read as follows:

"SEC. 179. Any corporation now existing, or hereafter to be formed under the laws of this State, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, for the first offense, be fined not less than $500 nor more than $5,000, and upon the second conviction, shall, in addition to said penalty, forfeit its charter and franchise and all its corporate rights and privileges, and it shall be the duty of the Attorney-General to take the necessary steps to enforce such forfeiture.

"This Act shall take effect immediately."

It is claimed on behalf of the petitioner that this provision of the Constitution, and the law passed in pursuance of it, are void because in violation of the Fourteenth Amendment of the Constitution of the United States, and the law passed to enforce its provisions known as the Civil Rights law; and also of the treaty between the United States and the Chinese Empire, commonly called the Burlingame Treaty.

The Fourteenth Amendment enacts that "no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Civil Rights Bill provides that all persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes licenses, and exactions of every kind, and to no other. (R. S. 1977.)

Section 2164 provides that no tax or charge shall be imposed or enforced by any State, upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon every person immigrating thereto from any other foreign country.

Article V of the Burlingame Treaty recognizes "the mutual advantage of the free immigration and emigration of the citizens and subjects" (of the United States and of the Emperor of China) "respectively, from the one country to the other for purposes of curiosity, or trade, or as permanent residents."

Article VI provides that "reciprocally, Chinese subjects visiting or *residing* in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel, or residence, as may there be enjoyed by the citizens or subjects of the most favored nation."

It was not disputed by the Attorney-General of California that these provisions of the treaty are within the treaty-making power of the United States, nor that the law under which the petitioner has been arrested, if in violation of those provisions, or those of the Fourteenth Amendment, or of the Civil Rights Bill, is void, anything in the Constitution of the State to the contrary notwithstanding.

But it is urged that the article of the Constitution of this State which permits corporations to be formed under general laws, reserves the right to repeal, alter, or amend those laws at the discretion of the Legislature; that their repeal would at once put an end to the corporate existence of the corporations, and that the right to put an end to their existence involves the right to prescribe the conditions upon which their existence shall be continued; that this right is theoretically and practically without limit, and may be exercised by imposing upon corporations, laws for the conduct of their business, and restrictions upon the use and enjoyment of their property, which would be unconstitutional and void if applied to private persons, and which may have the effect to defeat the object of the association, or to impair or even destroy the beneficial use of its property.

The State may, therefore, in the exercise of this reserved power, prescribe what persons may be employed by corporations organized under its laws, their number, their nationality, perhaps even their creed. It may determine what shall be their age or complexion, their height or their weight, the number of hours they shall work in a day, or the number of days in a week, and the rate of their wages.

These illustrations may seem extravagant, but they were all either recognized by counsel as within the scope of the reserved power, or else they are legitimate examples of the mode in which the reserved power, as claimed, might be exercised. For all such legislation the only remedy of the corporations is to disincorporate and cease to exist.

Such being the reserved power of the State over the creatures of its laws, it is urged that the treaty was not intended, and cannot be construed, to impair that right, any more than it could be deemed to abridge the right to enact laws in the interest of the public health, safety, or morals, usually known as police laws, or to regulate the making of contracts by providing who shall be incompetent to make them, as infants, married women, and the like.

When we consider the vast number of corporations which have been formed under the laws of this State, the claim thus put forth is well fitted to startle and alarm. It amounts in effect to a declaration that the corporations formed under the laws of this State and their stockholders, hold their property, so far as its beneficial use and enjoyment are concerned, at the mercy of the Legislature, and that rights which in the case of private individuals would be inviolable, have for them no existence.

The circumstances which led to the insertion in charters of incorporation of the reservation in question are well known.

The Supreme Court having decided that a charter of a literary institution was a contract, and therefore protected by the provision in the Constitution which forbids the States to make any law impairing the obligation of contracts, the reservation clause was introduced in order to withdraw the contract from the operation of the constitutional inhibition, and to retain to the authority which created the corporation the right to resume the granted powers, or to modify them, as the public interests might require.

It may confidently be affirmed that it was not intended to authorize the exercise of the unrestrained power over the operations of corporations, and the use of their property, contended for at the bar.

The adjudged cases, though they contain no precise definition of the extent and limits of this power applicable to all questions which may arise, are nevertheless full of instruction on the subject.

In *The sinking fund cases* (9 Otto, 720), Mr. Chief Justice Waite, delivering the opinion of the Court, says: "That this

power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made, but, as was said by this Court, through Mr. Justice Clifford, in *Miller* vs. *The State* (15 Wall. 498), 'it may safely be affirmed that the reserved power may be exercised to almost any extent to carry into effect the original purposes of the grant, or to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again, in *Holyoke Company* vs. *Lyman* (*Id.* 519), 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of a corporation.' Mr. Justice Field, also speaking for the Court, was even more explicit when, in *Tomlinson* vs. *Jessup* (*Id.* 459), he said, 'the reservation affects the entire relation between the State and the corporation, and places under legislative control all *rights and privileges*, derived by its charter directly from the State.' And again, as late as *Railroad Company* vs. *Maine* (96 U. S. 510), 'by the reservation the State retained the power to alter it (the charter) in all particulars constituting the grant to the new company formed under it of corporate rights, privileges, and immunities.' Mr. Justice Swayne, in *Shields* vs. *Ohio* (95 U. S. 324), says, by way of limitation, 'The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the Act of incorporation—sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." In his dissenting opinion in this case, Mr. Justice Field reproduces and explains the language used by him in *Tomlinson* vs. *Jessup*, and *Railroad Company* vs. *Maine*. He says: "The object of a reservation of this kind in Acts of incorporation, is to insure to Government control over corporate franchises rights and privileges which, in its sovereign or legislative capacity, it may call into existence, not to interfere with contracts which the corporation, created by it, may make; such is the purport of our language in *Tomlinson* vs. *Jessup*, where we state the object of the reservation to be 'to prevent a grant of CORPORATE rights and privileges in a

form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference;' and 'that the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities *derived by its charter directly from the State*' (5 Wall. 354). The same thing we repeated, with greater distinctness, in *R. R. Company* vs. *Maine*, where we said that 'by the reservation the State retained the power to alter the Act incorporating the company in all particulars *constituting the grant to it of corporate rights, privileges, and immunities*;' and that 'the existence of the corporation and its franchises and immunities, derived directly from the State, were thus kept under its control.' But we added, 'that the rights and interests acquired by the company, *not constituting a part of the contract of incorporation, stand upon a different footing*.' (96 U. S. 499."

(The *italics* are the learned Justice's own.)

In *Commonwealth* vs. *Essex Co.* (13 Gray, Mass. 239), Mr. J. Shaw says: "It seems to us that this power must have some limit, though it is difficult to define it. * * * * * Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this: that where, under a power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property *or rights* which have become vested under a legitimate exercise of the powers granted" (p. 253).

"This rule," says Mr. J. Strong, "has been recognized ever since." (99 U. S. 742.)

The language of Mr. J. Story in the Dartmouth College case, which, as before remarked, first led to the general insertion of the reservation clause in charters of incorporation, clearly indicates its object.

"When," he observes, "a private corporation is thus created by the charter of the Crown, it is subject to no other control on the part of the Crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose, the Crown cannot, in virtue of its

prerogative, alter or amend the charter, or divest the corporation of any of its franchises, or add to them, or augment or diminish the number of the trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporation to receive a new corporature." (4 Wheat. 675.)

"Probably," Mr. J. Bradley observes, "in view of the somewhat unexpected application of the clause" (forbidding the States to impair the obligation of contracts) "operating as it did to deprive the States of nearly all legislative control over corporations of their own creation, the Courts have given a liberal construction to the power to alter, amend, and repeal a charter, and have sustained some acts of legislation made under such a reservation which are at least questionable." (99 Otto, 748.)

In *Miller* vs. *The State* (15 Wall. 498), the Supreme Court says: "Power to legislate founded upon such a reservation in a charter to a private corporation is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such charter, and which by a legitimate use of the powers granted have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised to almost any extent to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of the assets. Such a reservation, it is held, will not warrant the Legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract." (*State* vs. *Adams*, 44 Missouri, 570; *Zabriskie* vs. *R. R. Co.*, 3 C. E. Green, 180; *R. R. Co.* vs. *Veazie*, 38 Maine, 581; *Sage* vs. *Dillard*, 15 B. Monroe, 359.) These citations sufficiently indicate the nature, object, and, to a certain degree, the extent of the powers reserved in the clause in question; and although they do not define their

limits in every direction, they lay down certain *ne plus ultra* boundaries which the Legislature may not pass.

Over all the rights, privileges, and immunities conferred by the charter upon the corporation, and which are derived from the charter, the Legislature has control. But, in the language of the Supreme Court, "the rights and interests acquired by the company, and not constituting a part of the contract of corporation, stand upon a different footing." (96 Otto, 499.)

The right to use a corporate name and seal, the right, under that name, to sue and be sued, to acquire property and to contract, are rights which owe their existence to the charter.

But when a contract has been made, or property acquired by a lawful exercise of the granted powers, the contract is as inviolable, and the right of property with everything incidental to that right as sacred, as in the case of natural persons.

It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property, the right to its lawful use and enjoyment.

It would be a "mockery, a delusion, and a snare" to say to a corporation: "The title to the property you have lawfully acquired we may not disturb, but we may prescribe such conditions as to its use, as will utterly destroy its beneficial value."

It need hardly be said that no reference is here intended to the power of the State to enact police laws—that is, laws to promote the health, safety, or morals of the public. To such laws corporations are amenable to the same extent as natural persons and no further.

The law in question does not affect to be a police law. Its validity, if applied to natural persons, was not contended for at the bar. The authority to pass it was sought to be derived exclusively from the reserved power over corporations.

It forbids the employment of Chinese. If the power to pass it exists, it might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest.

It might, as avowed at the bar, have prescribed a rate of wages, hours of work, or other conditions destructive of the profitable use of the corporate property.

Such an exercise of legislative power can only be maintained on the ground that stockholders of corporations have no rights which the Legislature is bound to respect.

Behind the artificial or ideal being created by the Statute and called a corporation, are the corporators—natural persons who have conveyed their property to the corporation, or contributed to it their money, and received as evidence of their interest, shares in its capital stock. The corporation, though it holds the title, is the trustee, agent, and representative of the shareholders, who are the real owners. And it seems to me that their right to use and enjoy their property is as secure under constitutional guarantees as are the rights of private persons to the property they may own. That the law in question, substantially and not merely theoretically, violates the constitutional rights of the owners of corporate property, can readily be shown.

Already several corporations representing investments of great magnitude submitting to its commands, have ceased their operations. It is probable that if the law be declared valid, many more will be forced to follow their example.

It applies to all corporations formed under the laws of this State.

If its provisions be enforced, a bank or a railroad company will lose the right to employ a Chinese interpreter to enable it to communicate with Chinese with whom it does business.

A hospital association would be unable to employ a Chinese servant to make known, or to minister to, the wants of a Chinese patient; and even a society for the conversion of the heathen, would not be allowed to employ a Chinese convert to interpret the Gospel to Chinese neophytes.

The language of the Supreme Court in *Shields* vs. *Ohio* (95 U. S. 324) has already been quoted:

"The alterations must be reasonable, they must be made in good faith, and consistent with the object and scope of the Act of incorporation."

"Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration."

Can it be pretended that this law, of the effect of which I have given these examples, is reasonable as between the State and the corporations, without regard to the treaty rights of Chinese residents.

Can it be said to be in good faith—that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public?

Is it not rather an attempt, "under the guise of amendment or alteration," to attain quite a different, and as I shall presently show, an unconstitutional object, viz: to drive the Chinese from the State, by preventing them from laboring for their livelihood? I apprehend that, to these questions, but one candid answer can be given.

I am therefore of opinion that, irrespective of the rights secured to the Chinese by the treaty, the law is void, as not being a "reasonable," *bona fide*, or constitutional exercise of the power to alter and amend the general laws under which corporations in this State have been formed. That it would be equally invalid if the proscribed class had been Irish, Germans, or Americans.

That the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon.

That they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms as may be agreed upon, subject only to such police laws as the State may enact with respect to them, in common with private individuals.

In the foregoing observations I have treated the question discussed as if the reservation had been found in a special charter, by which the corporation was created and its franchises conferred.

I have endeavored to show that such a reservation cannot be construed to authorize the Legislature to impair the obli-

gation of any contract lawfully made by a corporation, or to deprive the corporation of any vested property *or rights of property* lawfully acquired.

But in this State the Constitution forbids the Legislature to *create* private corporations by special act.

They may be "*formed*" (*i. e.*, by private persons), "*under general laws.*" All persons who choose to avail themselves of the provisions of these laws may acquire the franchises which they offer.

These *general laws* may be repealed or altered.

What would be the effect upon the existence or rights of corporations already formed, of the repeal or alteration of these laws, it is not necessary here to inquire.

It is sufficient to say that the legislative power cannot be *greater* under such a provision than under a reservation of a power to amend or repeal contained in a charter, by which a corporation is *created* and its franchises conferred.

II. But even, if the reserved power of the State over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty.

"In every such case" (where the Federal Government has acted), "the Act of Congress, or the treaty is supreme, and the laws of the State, *though enacted in the exercise of powers* not *controverted*, must yield to it." (Per Mr. C. J. Marshall, in *Gibbons* vs. *Ogden*, 9 Wheat. 211.)

The principle thus enunciated by the great Chief Justice has never since been disputed. (*Henderson* vs. *Mayor of New York*, 92 U. S. 272; *R. R. Company* vs. *Husen*, 95 U. S. 472.)

The article of the Constitution of this State under which the law under consideration was enacted is as follows:

ARTICLE XIX.

CHINESE.

SECTION 1. "The Legislature shall prescribe all necessary regulations for the protection of the State, and the counties, cities, and towns thereof from the burdens and evils arising from the presence of aliens who are or *may become* vagrants, paupers, mendicants, criminals, or invalids, afflicted with contagious or infectious diseases, and from aliens otherwise

dangerous or detrimental to the *well-being or peace* of the State, *and to impose conditions upon which such persons may reside in the State, and to provide the means and mode of their removal from the State* upon failure or refusal to comply with such conditions; *provided*, that nothing contained in this section shall be construed to impair or limit the power of the Legislature to pass such police laws or other regulations as it may deem necessary.

SEC. 2. "No corporation now existing, or hereafter formed under the laws of this State, shall, after the adoption of this Constitution, employ, *directly* or *indirectly*, in any capacity, any Chinese or Mongolians. The Legislature shall pass such laws as may be necessary to enforce this provision.

SEC. 3. "No Chinese shall be employed on any State, county, municipal, or other public work, except in punishment for crime.

SEC. 4. "The presence of foreigners ineligible to become citizens is declared to be dangerous to the well-being of this State, and the Legislature shall discourage their immigration by all the means within its power * * * * *."

The end proposed to be attained by this extraordinary article is clearly, and even ostentatiously avowed.

Its title proclaims that it is directed against the Chinese.

It forbids their employment by any but private individuals, and when through the operation of the laws they shall have become, or be liable to become vagrants, paupers, mendicants, or criminals, the Legislature is directed to provide for their removal from the State, if they fail to comply with such conditions as it may prescribe for their continued residence.

The framers of the article do not seem to have relied upon the efficacy of the provisions imposing such extensive restrictions upon the rights of the proscribed race to labor for their living, to reduce them to the condition of vagrants, paupers, mendicants, or criminals, or persons who "may become" such. The Legislature is directed to impose conditions of residence, and provide for the removal of "*aliens otherwise dangerous or detrimental to the well-being or peace of the State*," and lest any doubt or hesitation should be felt as to the propriety of including wealthy and respectable Chinese in this class, the fourth section declares "the presence of for-

eigners ineligible to become citizens of the United State" (*i. e.*, the Chinese) to be "dangerous to the well-being of the State." And the Legislature is directed to "discourage their immigration by all the means within its power."

Would it be believed possible, if the fact did not so sternly confront us, that such legislation as this could be directed against a race whose right freely to emigrate to this country, and reside here with all "the privileges, immunities, and exemptions of the most favored nation," has been recognized and guaranteed by a solemn treaty of the United States, which not only engages the honor of the National Government, but is by the very terms of the Constitution the supreme law of the land?

The Legislature has not yet attempted to carry into effect the mandate of the first section by imposing conditions upon which aliens who are or may become vagrants, paupers, mendicants, or criminals, may reside in the State, or by providing for their removal.

Its action thus far has been limited to forbidding the employment of Chinese, directly or indirectly, by any corporation formed under the laws of this State. The validity of this law is the only question presented for determination in the present case.

In considering this question we are at liberty to look not merely to the language of the law, but to its effect and purpose.

"In whatever language a statute may be framed, its purpose may be determined by its natural and reasonable effect; and if it is apparent that the object of this statute, as judged by that criterion, is to compel the owners of vessels to pay a sum of money for every passenger brought by them from a foreign shore and landed at the port of New York, it is as much a tax on passengers if collected from them, or a tax on the vessel or owners for the exercise of the right of landing their passengers in that city, as was the statute held void in the Passenger cases." (*Henderson* vs. *The Mayor*, etc., 92 U. S. R. 268.)

"If, as we have endeavored to show, in the opinion in the preceding cases, we are at liberty to look to the effect of a statute for the test of its constitutionality, the argument need go no further." (*Chy Lung* vs. *Freeman et al.*, 92 U. S. R. 279.)

If the effect and purpose of the law be to accomplish an unconstitutional object, the fact that it is passed in the pretended exercise of the police power, or a power to regulate corporations, will not save it. If a law of the State forbidding the Chinese to labor for a living, or requiring them to obtain a license for doing so, would have been plainly in violation of the Constitution and treaty, the State cannot attain the same end by addressing its prohibition to corporations.

In *Cummings* vs. *The State of Missouri*, Mr. J. Field, speaking for the Court, observes: "Now, as the State, had she attempted the course supposed, would have failed, it must follow that any other mode of producing the same result must equally fail. The provisions of the Federal Constitution intended to secure the liberty of the citizen cannot be evaded by the form in which the power of the State is exerted. If this were not so—if that which cannot be accomplished by means looking directly to the end can be accomplished by indirect means—the inhibition may be evaded at pleasure. No kind of oppression can be named against which the framers of the Constitution intended to guard, which may not be effected." (4 Wall. 320.)

The application of these pregnant words to the case at bar is obvious.

Few will have the hardihood to deny the purpose and effect of the article of the Constitution which has been cited. It is in open and seemingly contemptuous violation of the provisions of the treaty, which give to the Chinese the right to reside here with all the privileges, immunities, and exemptions of the most favored nation.

It is in fact but one and the latest of a series of enactments designed to accomplish the same end.

The attempt to impose a special license tax upon Chinese for the privilege of mining, the attempt to subject them to peculiar and exceptional punishments commonly known as the Queue Ordinance, have been frustrated by the judgments of this Court. The attempt to extort a bond from shipowners as a condition of being permitted to land those whom a Commissioner of Immigration might choose to consider as coming within certain enumerated classes, has received the emphatic

and indignant condemnation of the Supreme Court. (*Chy Lung* vs. *Freeman*, 92 U. S. R. 275.)

But the question which now concerns us is: Does the law under consideration impair or destroy the treaty rights of Chinese residents? For it may be a part of a system obviously designed to effect that purpose, and yet not of itself be productive of that result.

Its practical operation and effect must, therefore, be adverted to.

The advantages of combining capital, and restricting individual liability by the formation of corporations, have, from the organization of this State, been recognized by its laws. That method, now universal throughout the civilized world in the prosecution of great enterprises, has in this State received an unprecedented development. Its laws permit the formation of corporations for any purpose for which individuals may lawfully associate, and the corporations already formed cover almost every field of human activity. The number of certificates on file in the Clerk's office of this county alone was stated at the hearing to be 8397. The number in the entire State is of course far greater.

They represent a very large proportion of the capital and industry of the State.

The employment of Chinese, directly or indirectly, in any capacity by any of these corporations is prohibited by the law.

No enumeration would, I think, be attempted of the privileges, immunities, and exemptions of the most favored nation, or even of man in civilized society, which would exclude the right to labor for a living.

It is as inviolable as the right of property, for property is the offspring of labor.

It is as sacred as the right to life, for life is taken if the means whereby we live be taken.

Had the labor of the Irish or Germans been similarly proscribed, the legislation would have encountered a storm of just indignation. The right of persons of those or other nationalities to support themselves by their labor stands on no other or higher ground than of the Chinese. The latter

have even the additional advantage afforded by the express and solemn pledge of the nation.

That the unrestricted immigration of the Chinese to this country is a great and growing evil, that it presses with much severity on the laboring classes, and that if allowed to continue in numbers bearing any considerable proportion to that of the teeming population of the Chinese Empire, it will be a menace to our peace and even to our civilization, is an opinion entertained by most thoughtful persons.

The demand, therefore, that the Treaty shall be rescinded or modified is reasonable and legitimate. But while that Treaty exists, the Chinese have the same rights of immigration and residence as are possessed by any other foreigners. Those rights it is the duty of the courts to maintain, and of the Government to enforce.

The declaration that "the Chinese must go, peaceably or forcibly," is an insolent contempt of national obligations and an audacious defiance of national authority. Before it can be carried into effect by force, the authority of the United States must first be not only defied, but resisted and overcome.

The attempt to effect this object by violence will be crushed by the power of the Government.

The attempt to attain the same object indirectly by legislation will be met with equal firmness by the courts; no matter whether it assumes the guise of an exercise of the police power, or of the power to regulate corporations, or of any other power reserved by the State; and no matter whether it takes the form of a constitutional provision, legislative enactment, or municipal ordinance.

I have considered this case at much greater length than the difficulty of the questions involved required.

But I have thought that their great importance, and the temper of the public with regard to them, demanded that no pains should be spared to demonstrate the utter invalidity of this law.

SAWYER, Circuit Judge: The Constitution of California, adopted in 1879, provides that: "No corporation now existing, or hereafter formed, under the laws of this State, shall, after the adoption of this Constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The Legislature shall pass such laws as may be necessary to enforce this provision." (Article XIX, section 2.)

In obedience to this mandate of the Constitution, the Legislature, on February 13, 1880, passed an Act entitled "An Act to amend the Penal Code by adding two new sections thereto, to be known as sections 178 and 179, prohibiting the employment of Chinese by corporations," the first section of which statute reads as follows:

"SECTION 1. A new section is hereby added to the Penal Code, to be numbered section 178.

"SEC. 178. Any officer, director, manager, member, stockholder, clerk, agent, servant, attorney, employee, assignee, or contractor of any corporation now existing, or hereafter formed, under the laws of this State, who shall employ, in any manner or capacity, upon any work or business of such corporation, any Chinese or Mongolian, is guilty of a misdemeanor, and is punishable by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail of not less than 50 nor more than 500 days, or by both such fine and imprisonment; *provided*, that no director of a corporation shall be deemed guilty, under this section, who refuses to assent to such employment, and has such dissent recorded in the minutes of the Board of Directors.

"1. Every person who, having been convicted for violating the provisions of this section, commits any subsequent violation thereof after such conviction, is punishable as follows:

"2. For each subsequent conviction, such person shall be fined not less than five hundred nor more than five thousand dollars, or by imprisonment not less than two hundred and fifty days nor more than two years, or by both such fine and imprisonment."

The petitioner is President and Director of the Sulphur Bank Quicksilver Mining Company, a corporation organized under the laws of California before the adoption of the present Constitution, but still doing business within the State. Having been arrested and held to answer before the proper

State Court, upon a complaint duly made, setting out in due form the offense of employing in the business of said corporation certain Chinese citizens of the Mongolian race, created by said Act, he sued out a writ of *habeas corpus*, which, having been returned, he asks to be discharged, on the ground that said provisions of the Constitution, and Act passed in pursuance thereof, are void, as being adopted and passed in violation of the provisions of the treaty of the United States with the Chinese Empire, commonly called the "Burlingame Treaty," and of the Fourteenth Amendment to the Constitution of the United States, and of the Acts of Congress passed to give effect to said amendment. The question in this case, therefore, is as to the validity of said Constitutional provision and said Act. Article I, section 10, of the Constitution of the United States, provides that "no State shall enter into any treaty, alliance, or confederation." Article II, section 2, that the President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present shall concur;" and Article VI that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and *all treaties* made, or which shall be made, under the authority of the United States, shall be the *supreme* law of the land, and the Judges in *every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*" There can be no mistaking the significance or effect of these plain, concise, emphatic provisions. The States have surrendered the treaty-making power to the General Government, and vested it in the President and Senate; and when duly exercised by the President and Senate, the treaty resulting is the *supreme law* of the land, to which not only State laws but *State Constitutions* are in express terms subordinated. Soon after the adoption of this Constitution, the Supreme Court of the United States had occasion to consider this provision, making treaties the supreme law of the land, in *Ware* vs. *Hylton*, and Mr. Justice Chase, speaking of its effect, said: "A treaty cannot be the supreme law of the land—that is, of all the United States—if any Act of a State Legislature can stand in its way. If the

Constitution of a State (which is the fundamental law of the State, and paramount to its Legislature) must give way to a treaty and fall before it, can it be questioned whether the less power, an Act of the State Legislature, must not be prostrate? It is the declared will of the people of the United States that every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State, and their will alone is to decide. If a law of a State, contrary to a treaty, is not void, but voidable only by repeal, or nullification by a State Legislature, this certain consequence follows: that the will of a small part of the United States may control or defeat the will of the whole." (3 Dall. 236.) Again: "It is the declared duty of the *State Judges* to determine any constitution or laws of any State contrary to that treaty, or *any other* made under the authority of the United States, null and void. *National or Federal Judges are bound by duty and oath to the same conduct.*" (*Ib.* 237.) And again: "It is asked, did the fourth article intend to annul a law of the State, and destroy rights under it? I answer, that the fourth article did intend to destroy all lawful impediments, past and future; and that the law of Virginia, and the payment under it, is a lawful impediment, and would bar a recovery, if not destroyed by this article of the treaty. * * * I have already proved that a treaty can totally annihilate any part of the Constitution of any of the individual States that is contrary to a treaty." (*Ib.* 242–3.)

The case of *Hauenstein* vs. *Lynham*, being an action by citizens and residents of Switzerland, heirs of an alien who died in Virginia, leaving property which had been adjudged to have escheated to the State, to recover the proceeds of said property, was decided at the present term of the United States Supreme Court on writ of error to the Court of Appeals of the State of Virginia. The Courts of Virginia had held that, under the laws of Virginia, the proceeds of the property sought to be recovered belonged to the State; but the judgment was reversed by the Supreme Court of the United States, on the ground that the laws of Virginia were in conflict with a treaty of the United States with the Swiss Confederation. After construing the treaty, the Court says:

"It remains to consider the effect of the treaty thus construed upon the rights of the parties. That the laws of the State, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs in error. The efficacy of the treaty is declared and guaranteed by the Constitution of the United States." The Court cites and comments upon *Ware* vs. *Hylton*, *supra*, and then proceeds: "In *Chirac* vs. *Chirac*, 2 Wheat, 259, it was held by this Court that a treaty with France gave to the citizens of that country the right to purchase and hold land in the United States, and that it removed the incapacity of alienage, and placed the parties in precisely the same situation as if they had been citizens of this country. The State law was hardly adverted to, and seems not to have been considered a factor of any importance in this view of the case. The same doctrine was reaffirmed touching this treaty in *Carneal* vs. *Banks*, 10 Wheat. 189, and with respect to the British treaty of 1794, in *Hughes* vs. *Edwards*, 9 *Ib.* 489. A treaty stipulation may be effectual to protect the land of an alien from forfeiture by *escheat* under the laws of a State. (*Orr* vs. *Hodgson*, 4 Wheat. 453.) Mr. Calhoun, after laying down certain exceptions and qualifications which do not affect this class of cases, says: "Within these limits, all questions which may arise between us and other Powers, be the subject matter what it may, fall within the treaty-making power, and may be adjusted by it." (Treat. on the Constitution and Government of the United States, 204.) If the National Government has not the power to do what is done by such treaties, it cannot be done at all; for the States are expressly forbidden to enter into any treaty, alliance or confederation." (Const., Art. I, sec. 10.) It must always be borne in mind that the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and constitution. This is a fundamental principle in our system of complex national polity. (See also *Shanks* vs. *Dupont*, 3 Pet. 242; *Foster* vs. *Neilson*, 2 *Ib.* 314; *The Cherokee Tobacco*, 11 Wall. 616; Mr. Pinkney's Speech, 3 El. of the U. S. 281; *People ex rel.* vs. *Gerke*, 5 Cal. 381.) We have no doubt that this treaty is within the

treaty-making power conferred by the Constitution. And it is our duty to give it full effect." (The Reporter, Vol. IX, p. 268.)

If therefore the constitutional provision, and the statute in question made in pursuance of its mandate, are in conflict with a valid treaty with China, they are void. The treaty between the United States and China of July 28, 1868, contains the following provisions:

"Article V. The United States and the Emperor of China cordially recognize the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other for purposes of curiosity, of trade, or *as permanent* residents."

"Article VI. Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities, or exemptions, in respect to travel *or residence*, as may there be enjoyed by the citizens or subjects of the most favored nation. And reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to travel *or residence*, as may there be enjoyed by the citizens or subjects of the most favored nation." (16 Stat. 740.)

Thus the right of the Chinese to change their homes, and to freely emigrate to the United States for the purpose of *permanent residence*, is, in express terms, recognized; and the next article in express terms stipulates that Chinese residing in the United States shall enjoy the same privileges, immunities, and exemptions, in respect to residence, as may there be enjoyed by the citizens and subjects of the most favored nation. The words "privileges and immunities," as used in the Constitution in relation to rights of citizens of the different States, have been fully considered by the Supreme Court of the United States, and generally defined, and there can be no doubt that the definitions given are equally applicable to the same words as used in the treaty with China. In the "Slaughter-house Cases," the Supreme Court approvingly cites and reaffirms from the opinion of Mr. Justice Washington, in *Corfield* vs. *Coryell*, the following passage: "The inquiry is, what are the privi-

leges and immunities of citizens of the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are *fundamental*; which belong to the rights of citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: Protection by the Government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole." The Court then adds: "The description, when taken to include others not named, but which are of the same general character, *embraces nearly every civil right for the establishment and protection of which organized government is established.*" (16 Wall. 76.) And in *Ward* vs. *Maryland*, the same Court observes: "Beyond doubt these words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful *commerce, trade,* or *business without molestation; to acquire personal property; to take and hold real estate,*" etc. (12 Wall. 430.) So in the "Slaughter-house Cases," Mr. Justice Field remarks upon these terms: "The privileges and immunities designated are those which of right belong to citizens of all free governments. Clearly among these must be placed *the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.* (16 Wall. 97.) Mr. Justice Bradley, in discussing the question as to what is embraced in the "privileges and immunities" secured to the citizens, among other equally pointed and emphatic declarations, says: "In my judgment, the right of any citizen to follow whatever *lawful employment he chooses to adopt* (submitting himself to all lawful regulations) is one of *his most valuable rights, and one which the Legislature of a State cannot invade,*

whether restrained by its own Constitution or not. (*Ib.* 113-114.) He also enumerates as among the fundamental rights embraced in the privileges and immunities of a citizen all the absolute rights of individuals classed by Blackstone under the three heads: "The right of personal security; the right of personal liberty; and the right of private property." (*Ib.* 115.) And in relation to these rights, says: "In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, *does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.*" (*Ib.* 122.) And Mr. Justice Swayne supports this view in the following eloquent and emphatic language: "Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. *Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property.*" (*Ib.* 127.) Some of these extracts are from the dissenting opinions, but not upon points where there is any disagreement. There is no difference of opinion as to the significance of the terms "privileges and immunities." Indeed, it seems quite impossible that any definition of these terms could be adopted, or even seriously proposed, so narrow as to exclude the right to labor for subsistence. As to by far the greater portion of the Chinese, as well as other foreigners who land upon our shores, their labor is the only exchangeable commodity they possess. To deprive them of the right to labor is to consign them to starvation. The right to labor is, of all others, after the right to live, the fundamental, inalienable right of man, wherever he may be permitted to be, of which he cannot be deprived, either

under the guise of law or otherwise, except by usurpation and force. Man ate and died. When God drove him "forth from the Garden of Eden to till the ground, from whence he was taken," and said to him, "in the sweat of thy face shalt thou eat bread, till thou return unto the ground," He invested him with an inalienable right to labor in order that he might again eat and live. And this absolute, fundamental, and natural right was guaranteed by the National Government to all Chinese who were permitted to come into the United States under the treaty with their Government, "for the purposes of curiosity, of trade, or as permanent residents," to the same extent as it is enjoyed by citizens of the most favored nation. It is one of the "privileges and immunities" which it was stipulated that they should enjoy in that clause of the treaty which say: "Chinese subjects, visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation." And any legislation or constitutional provision of the State of California which limits or restricts that right to labor to any extent, or in any manner not applicable to citizens of other foreign nations visiting or residing in California, is in conflict with this provision of the treaty; and such are the express provisions of the Constitution and statute in question. The same view of the effect of the treaty was taken in *Baker* vs. *Portland*, by Judge Deady, of the District of Oregon, and concurred in by Mr. Justice Field on application for rehearing. (5 Saw. 566-572; 3 Pacific Coast Law Journal, 469.) I should not have deemed it necessary to cite so fully the opinions of others on a proposition so plain to my mind, but for the gravity of the question, and the fact that the people of California and their representatives in the Legislature have incorporated in the Constitution of the State, and in legislation had in pursuance of the constitutional mandate, after full discussion, provisions utterly at variance with the views expressed. Under such circumstances I feel called upon to largely cite the thoroughly-considered and authoritative views of those distinguished jurists upon whom will

devolve the duty of ultimately determining the points in controversy.

As to the point whether the provision in question is within the treaty-making power, I have as little doubt as upon the point already discussed. Among all civilized nations, in modern times at least, the treaty-making power has been accustomed to determine the terms and conditions upon which the subjects of the parties to the treaty shall reside in the respective countries, and the treaty-making power is conferred by the Constitution in unlimited terms. Beside, the authorities cited on the first point fully cover and determine this question. If the treaty-making power is authorized to determine what foreigners shall be permitted to come into and reside within the country, and who shall be excluded, it must have the power generally to determine and prescribe upon what terms and conditions, such as are admitted, shall be permitted to remain. If it has authority to stipulate that aliens residing in a State may acquire and hold property, and on their death transmit it to alien heirs who do not reside in the State, against the provisions of the laws of the State, otherwise valid—and so the authorities already cited hold—then it certainly must be competent for the treaty-making power to stipulate that aliens residing in a State in pursuance of the treaty may labor in order that they may live and acquire property that may be so held, enjoyed, and thus transmitted to alien heirs. The former must include the latter—the principal, the incidental power. (See also *Holden* vs. *Joy*, 17 Wall. 242-3; *U. S.* vs. *Whiskey*, 3 Otto, 196-8.)

But the provisions in question are also in conflict with the Fourteenth Amendment of the National Constitution, and with the statute passed to give effect to its provisions. The Fourteenth Amendment, among other things, provides that: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1977 of the Revised Statutes, passed to give effect to this amendment, provides that: "All persons within the

jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

It will be seen that in the latter clause the words are "any person," and not "any citizen," and prevents any State from depriving "any person" of life, liberty, or property without due process of law, or from denying to "any person within its jurisdiction the equal protection of the law." In the particulars covered by these provisions it places the right of every person within the jurisdiction of the State, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing, and under the same protection as are the rights of citizens themselves under other provisions of the Constitution; and, in consonance with these provisions, the statute enacts that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory *to make and enforce contracts, * * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.*" Chinese residing in California, in pursuance of the treaty stipulations, are "persons within the jurisdiction of the State," and "of the United States," and therefore within the protection of these provisions. *And contracts to labor, such as all others make, are contracts which they have a "right to make and enforce," and the laws under which others' rights are protected are the laws to which they are entitled to the "equal benefits," "as is enjoyed by white citizens."*

It would seem that no argument should be required to show that the Chinese do not enjoy the equal benefit of the laws with citizens, or "the equal protection of the laws," where the laws forbid their laboring, or making and enforcing contracts to labor, in a very large field of labor which is open without limit, let, or hindrance to all citizens and all other foreigners, without regard to nation, race, or color. Yet in the face of these plain provisions of the National

Constitution and Statutes, we find both in the Constitution and laws of a great State and member of this Union, just such prohibitory provisions and enactments discriminating against the Chinese. Argument and authority, therefore, seem still to be necessary, and fortunately we are not without either. From the citations already made, and from many more that might be made from Justices Field, Bradley, Swayne, and other judges, it appears that to deprive a man of the right to select and follow any lawful ocupation—that is, to labor, or contract to labor, if he so desires and can find employment—is to deprive him of both liberty and property, within the meaning of the Fourteenth Amendment and the Act of Congress. Says Mr. Justice Bradley: "For the preservation, exercise, and enjoyment of these rights, the individual citizen, as a necessity, must be left free to adopt such calling, profession, or trade, as may seem to him most conducive to that end. Without this right he cannot be a freeman. This right to choose one's calling is an essential part of that liberty, which it is the object of Government to protect; and a calling, *when chosen, is a man's property and right. Liberty and property are not protected where those rights are arbitrarily assailed.*" (16 Wall. 116.) Whatever may be said as to this clause of the amendment, there can be no doubt as to the effect of the Act. With respect to the last clause, Mr. Justice Bradley says, of a law which interferes with a man's right to choose and follow an occupation: "*Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.*" (*Ib.* 122.) And Mr. Justice Swayne: "*The equal protection of the laws places all upon an equal footing of legal equality, and gives the same protection to all for the perservation of life, liberty, and property, and the pursuit of happiness.*" (*Ib.* 127.) In *Ah Kow* vs. *Nunan*, 5 Saw. 562; 3 Pacific Coast Law Journal, 413, Mr. Justice Field observes: "But in our country, hostile and *discriminating legislation by a State* against persons of any class, sect, creed, or nation, in whatever form it may be expressed, *is forbidden by the Fourteenth Amendment of the Constitution.* That amendment, in its first section, declares who are citizens of the

United States, and then enacts that no State shall make or enforce any law which shall abridge their privileges and immunities. It further declares that no State shall deprive *any person* (dropping the distinctive term citizen) of life, liberty, or property, without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one while within the United States, from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offenses no greater or different punishment."

And the same views are expressed with equal emphasis in *In re Ah Fong*, 3 Saw. 157. Discriminating State legislation has often been held void by the Supreme Court, as being in violation of other provisions of the National Constitution, no more specific than the Fourteenth Amendment. (*Welton* vs. *Missouri*, 1 Otto, 277, 282; *Cook* vs. *Pennsylvania*, 7 Otto, 572–3, and numerous cases cited.)

Since the foregoing was written, I have received the opinion of the Supreme Court of the United States in *Strauder* vs. *The State of West Virginia*, recently decided, which appears to me to authoritatively dispose of the point now under consideration. The case was an indictment of a colored man for murder, and the statute of West Virginia limited the qualified jurors to white citizens. The statute stating the qualifications of jurors was in the following words: "All white male persons, who are twenty-one years of age, and who are citizens of this State, shall be liable to serve as jurors, except as herein provided"—the exceptions being State officials. This was claimed to be a violation of

the Fourteenth Amendment, as excluding colored citizens otherwise qualified from jury service; and the Supreme Court so held. The Court, in deciding the case, says the Fourteenth Amendment "ordains that no State shall deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory; but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively, as colored; exemption from legal discriminations, implying inferiority in civil society, lessening the security of the enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race. *That the West Virginia Statute respecting juries*—the statute that controlled the selection of the grand and petit jury in the case of the plaintiff in error—*is such a discrimination, ought not to be doubted, nor would it be if the persons excluded by it were white men.*" (10 Alb. Law Jour. 227.) In speaking of the Act to enforce this amendment, the Court further says, sections 1977 and 1978, of the Revised Statutes, before cited, "partially enumerate the rights and immunities intended to be guaranteed by the Constitution;" and that, "this Act puts in the form of a statute what had been substantially ordained by the Constitutional amendment." (*Ib.* 228.) If this exclusion of colored men from sitting upon a jury by *implication* is a violation of the Constitution, as denying the equal protection of the laws to colored persons, *a fortiori* must the express positive provisions of the Constitution and Act of the Legislature of the State of California be in conflict with that instrument, as denying the equal protection of the laws to the Chinese residents of the State. Upon reason

and these authorities, then, it seems impossible to doubt that the provisions in question are both in letter and spirit in conflict with the Constitution and laws of the United States, as well as with the stipulations of the treaty with China. And this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the Constitution itself, and the laws passed to give it effect, irrespective of treaty stipulations.

But it is urged on behalf of the respondent that, under the provisions of Article XII of the State Constitution, providing that "all laws * * concerning corporations * * may be altered from time to time, or repealed," the power of the Legislature over corporations is absolutely unlimited; that it may, by legislation under this reserved power, impose any restrictions or limitations upon the acts and operations of corporations, however unreasonable, stringent, or injurious to their interests; and as a penalty for violating such restrictions, destroy them, and criminally punish their officers, agents, servants, employees, assignees, or contractors; that, as a condition of continued existence, they may be prohibited from employing Chinese, and the prohibition enforced against the corporation and the persons named by means of the penalties indicated; and thus, by means of the State's control over the corporation created by its authority, it can indirectly accomplish the purpose of excluding the Chinese from, perhaps, their largest and most important field of labor —a purpose *which could not be accomplished by direct means.* This position the Attorney-General and the other counsel for the respondent, most earnestly press, and upon it they most confidently rely.

I do not assent to any such unlimited power over corporations. There must be—there is—a limit somewhere. That there is such a limit is recognized and expressly asserted in numerous cases by the Supreme Court of the United States, and by the highest courts of many of the States; and I know of none to the contrary. But precisely where the line is to be drawn, I confess, in the present state of the authoritative

adjudications, I am unable to say. I am inclined to the opinion, however, that it would exclude legislation of the character in question, even if it concerned the State and the corporations alone, and did not conflict with other rights protected by treaties with foreign nations, or by the Constitution of the United States—the supreme law of the land. But assume it to be otherwise. When the State legislation affecting its corporations comes in conflict with the stipulations of valid treaties, and with the National Constitution, and laws made in pursuance thereof, it must yield to their superior authority. And such, in my judgment, are the provisions in question. The policy of the constitutional provision and statute in question does not have in view the relations of the corporation to the State, as the object to be effected or accomplished; but it seeks to reach the Chinese, and exclude them from a wide range of labor and employment, the ultimate end to be accomplished being to drive those already here from the State, and prevent others from coming hither—*the discriminating legislation being only the means by which the end is to be attained—the ultimate purpose to be accomplished. The end sought to be attained is unlawful.* It is in direct violation of our treaty stipulations and the Constitution of the United States. The end being unlawful and repugnant to the supreme law of the land, it is equally unlawful, and equally in violation of the Constitution and treaty stipulations, to use any means, however proper, or within the power of the State for lawful purposes, for the attainment of that unlawful end, or accomplishment of that unlawful purpose. It cannot be otherwise than unlawful to use any means whatever to accomplish an unlawful purpose. This proposition would seem to be too plain to require argument or authority. Yet there is an abundance of authority on the point, although perhaps not stated in this particular form. (*Brown* vs. *Maryland*, 12 Wheat. 419; *Ward* vs. *Maryland*, 12 Wall. 431; *Woodruff* vs. *Parham*, 8 Wall. 130, 140; *Hinson* vs. *Lott*, *Id.* 152; *Welton* vs. *Missouri*, 1 Otto, 279, 282; *Cook* vs. *Pennsylvania*, 7 Otto, 573.) These cases hold that the power of taxation, and power to require licenses, are legitimate powers to be exercised without discrimination; but

they are unlawful and unconstitutional when used to discriminate against foreign goods or manufacturers of other States. That is to say, they are constitutional and lawful when used for a constitutional and lawful purpose, but unlawful and in violation of the Constitution when used to attain an unlawful or unconstitutional end. And whatever form the law may take on, or in whatever language be couched, the Court will strip off its disguise, and judge of the purpose from the manifest intent as indicated by the effect. In *Cummings* vs. *Missouri*, Mr. Justice Field, in speaking for the Court, says: "The difference between the last case supposed, and the case as actually presented, is one of form only, and not substance. * * * The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the law-maker, in the case supposed, would be openly avowed; in the case existing, it is only disguised. The legal result must be the same; for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (4 Wall. 325. See also *Henderson* vs. *Mayor of New York*, 2 Otto, 268; *Chy Lung* vs. *Freeman*, *Ib.* 279; *Railroad Co.* vs. *Husen*, 5 Otto, 472.)

In *Doyle* vs. *Continental Insurance Co.*, 4 Otto, 535, most confidently relied on by the respondent, the end to be accomplished—the exclusion of a foreign corporation from doing business in the State except upon conditions prescribed by the State—was lawful, and the means adopted lawful. There were no rights secured by treaty or the National Constitution violated. The State and the foreign corporation were the only parties, and their rights the only rights affected. Had the Legislature, instead of prohibiting the corporation from doing business in the State as a

penalty for violation of the conditions prescribed, attempted to enforce compliance by *criminally punishing the agent* who transferred the action brought against the corporation from the State to the National Court, the question would certainly have been different, and the statute making the transfer a misdemeanor would have been void; for under the Constitution of the United States the foreign corporation had a right to transfer the case, of which the State could not by law, nor the corporation by stipulation, deprive it, as was held in *Insurance Company* vs. *Morse*, 20 Wall. 445. It being lawful to transfer, and the right to transfer being secured by the National Constitution, it was incompetent for the Legislature to make the transfer an offense, and punish it as such, in violation of the supreme law of the land. The act could not at the same time be both lawful and criminal. And this is the plain distinction between the case relied on and the one now under consideration.

The object, and the only object, to be accomplished by the State constitutional and statutory provisions in question is manifestly to restrict the right of the Chinese residents to labor, and thereby deprive them of the means of living, in order to drive those now here from the State, and prevent others from coming hither; and this abridges their privileges and immunities, and deprives them of the equal protection of the laws, in direct violation of the treaty and Constitution—the supreme law of the land. To perceive that the means employed are admirably adapted to the end proposed, it is only necessary to consider for a moment some of the leading provisions of Article XIX of the State Constitution. Section 1 provides that: "The Legislature shall prescribe all necessary regulations for the protection of the State * * * from the burdens and evils arising from the presence of aliens who are or *may become* vagrants, paupers, mendicants, criminals, etc., * * * and to impose conditions upon which such persons may reside in the State, and to provide the means and mode of their removal from the State upon failure or refusal to comply with such conditions."

Section 2 is the one which prohibits any corporation

from employing, directly or indirectly, in any capacity, any Chinese or Mongolians; and section 3 provides that: "No Chinese shall be employed on any State, municipal, or other work, except in punishment for crime." After providing for the removal from the State of all who "*may become* vagrants, paupers, etc.," it is difficult to conceive of any more effectual means, so far as they go, to reduce the Chinese to "vagrants, paupers, mendicants, and criminals," in order that they may be removed, than to forbid their employment, "directly or indirectly, in any capacity"—that is to say, to exclude them from engaging in useful labor. If it is competent for the State to enforce these provisions, it may also prohibit corporations from dealing with them in any capacity whatever—from purchasing from or selling to them any of the necessaries of life, or any articles of trade and commerce.

In view of the vast extent of the field of labor and business now engrossed by corporations, to exclude the Chinese from all dealings with corporations is to reduce their means of avoiding vagrancy, pauperism, and mendicity to very narrow limits; and from the present temper of our people, and the number of bills now pending before the Legislature tending to that end, there can be no doubt that if the legislation now in question can be sustained, the means of avoiding the condition of pauperism denounced in the State Constitution and laws would soon be reduced to the *minimum*.

In the language of Deady, J., in *Baker* vs. *Portland*, "Admit the wedge of State interference ever so little, and there is nothing to prevent its being driven home and overriding the treaty-making power altogether." (5 Saw. 750; 3 Pac. Coast Law Journal, 469.)

Vagrancy and pauperism, one would suppose, ought to be discouraged rather than induced by solemn constitutional mandates requiring legislation necessarily leading to such vices. Common experience, I think, would lead to the conclusion that the Chinese within the State, with equal opportunities, are as little likely to fall into vagrancy, pauperism, and mendicity, and thereby become a public charge, as any other class, native or foreign born. Industry and economy, by which the Chinese are able to labor cheaply and still ac-

cumulate large amounts of money to send out of the country—the objection perhaps most frequently and strenuously urged against their presence—are not the legitimate parents of "vagrancy, pauperism, mendicity, and crime." There are other objections to an unlimited immigration of that people, founded on distinctions of race and differences in the character of their civilization, religion, and other habits, to my mind of a far more weighty character. But these, unfortunately for those seeking to evade treaty stipulations and constitutional guarantees, can by no plausible misnomer be ranged under the police powers of the State.

Holding, as we do, that the constitutional and statutory provisions in question are void, for reasons already stated, we deem it proper again to call public attention to the fact, however unpleasant it may be to the very great majority of the citizens of California, that however undesirable, or even ultimately dangerous to our civilization, an unlimited immigration of Chinese may be, the remedy is not with the State, but with the General Government. The Chinese have a perfect right, under the stipulations of the treaty, to reside in the State, and enjoy all privileges, immunities, and exemptions that may there be enjoyed by the citizens and subjects of any other nation; and under the Fourteenth Amendment to the National Constitution, the right to enjoy "life, liberty, and property," and "the equal protection of the laws," in the same degree and to the same extent as these rights are enjoyed by our own citizens; and in the language of Mr. Justice Bradley, in the Slaughter-house Cases, "*the whole power of the nation is pledged to sustain those rights.*" To persist, on the part of the State, in legislation in direct violation of these treaty stipulations, and of the Constitution of the United States, and in endeavoring to enforce such void legislation, is to waste efforts in a barren field, which, if expended in the proper direction, might produce valuable fruit; and besides, it is little short of incipient rebellion.

In 1870 the Chinese at Tien-tsin, actuated by similar unfriendly feelings and repugnance toward foreigners of the Caucasian race, made a riotous attack upon the missionaries station-

ed at that place, killed some French and Russian citizens, and destroyed the buildings and property of French, Russian, and American residents. These Powers promptly and energetically demanded satisfaction from the Chinese Empire under their various treaties. The result was that fifteen Chinese were convicted and executed, and twenty others banished. The two magistrates having jurisdiction as heads of the city government were also banished, for not taking effectual means to suppress the riot and protect the foreigners. The buildings of the American citizens were re-erected, and the property destroyed paid for, to the satisfaction of the parties suffering, and at the expense of the city. (Papers on Foreign Relations for 1871.) Thus, under the same treaty which guarantees the rights of Chinese subjects to reside and pursue all lawful occupations in California, the United States were prompt to demand satisfaction for injuries resulting to our citizens from infractions of the treaty by citizens of China. And the Chinese Government promptly punished the guilty parties, and made ample satisfaction for the pecuniary losses sustained. It ought to be understood by the people of California, if it is not now, that the same measure of justice and satisfaction which our Government demands and receives from the Chinese Emperor for injuries to our citizens resulting from infractions of the treaty, must be meted out to the Chinese residents of California who sustain injuries resulting from infractions of the same treaty by our own citizens, or by other foreign subjects residing within our jurisdiction, and enjoying the protection of similar treaties and of our laws. And it should not be forgotten that in case of destruction of, or damage to Chinese property by riotous or other unlawful proceedings, the city of San Francisco, like the more populous city of Tien-tsin, may be called upon to make good the loss.

In view of recent events transpiring in the city of San Francisco, in anticipation of the passage of the statute now in question, which have become a part of the public history of the times, I deem it not inappropriate in this connection to call attention to the fact, of which many are probably unaware, that

the Statutes of the United States are not without provisions, both of a civil and criminal nature, framed and designed expressly to give effect to, and enforce that provision of, the Fourteenth Amendment to the National Constitution, which guarantees to every "person"—which term, as we have seen, includes Chinese—"within the jurisdiction" of California, "the equal protection of the laws." Section 1979 of the Revised Statutes provides a civil remedy for infractions of this amendment. It is as follows: "Every person who, under the color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured, in an action at law, suit in equity, or other proper proceeding for redress."

Thus a remedy by action is given to any "person," against any other person who deprives him of "any right, privilege, or immunity," secured to him by the Constitution, even if it is done "under color of any statute, ordinance, regulation, custom, or usage of the State." Possibly the prisoner might have been liable had he, in pursuance of the mandate of the statute in question, *and on that ground* discharged the Chinamen for whose employment he is now under arrest. But it is unnecessary to so determine now. At all events, he stood between two statutes, and he was bound to yield obedience to that which is superior.

Section 5510 makes a similar deprivation of rights under color of any statute, etc., a criminal offense, punishable by fine and imprisonment. And section 5519 provides that "if two or more persons in any State * * * conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons, of the equal protection of the laws, or of equal privileges and immunities under the law, * * * each of such persons shall be punished by a fine of not less than five hundred dollars nor more than five thousand dollars, or by imprisonment, with or without hard labor, not less than six months nor

more than six years, or by both such fine and imprisonment." These provisions of the United States Statutes—the supreme law of the land—are commended to the consideration of all persons who are disposed to go from place to place, and, by means of threats and intimidation, endeavor to compel employers to discharge peaceable and industrious Chinamen engaged in their service. There are other provisions, both civil and criminal, of a similar character, having the same end in view.

Only a few days since, the Supreme Court of the United States sustained an indictment in *In re Coles* and *The Commonwealth of Virginia*, petitioners, on *habeas corpus* against a County Judge of Virginia, found under section 4 of the Civil Rights Act of 1875 (18 Stat. 336), for failing to summon colored citizens as jurors, "on account of race and color." The Court held this Act to be constitutional and valid under the Fourteenth Amendment, *and that it deprived colored citizens of the equal protection of the laws.* Thus it appears that Congress, by the most stringent statutory provisions, has provided for the protection of all citizens and persons within the jurisdiction of the United States, in the full and complete enjoyment of the "equal protection of the laws," and of all "privileges and immunities guaranteed" by the Fourteenth Amendment in all their phases; and that the highest judicial tribunal of the nation has deemed it its duty to give such statutory provisions the fullest and most complete effect.

The result is that the prisoner is in custody in violation both of the Constitution and laws of the United States, and of the treaty between the United States and the Empire of China, and is entitled to be discharged; and it is so ordered.

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Current Topics.

OUR Supreme Court held, in *Hyatt* vs. *Allen* (opinion filed March 23, 1880), that under the provisions of the new Constitution (section 4, Article VI) the Supreme Court has power to grant an application, in the nature of an original one to that Court, for a writ of mandamus. It was contended that the Court could issue such writs only in aid of its appellate jurisdiction; and Mr. Justice THORNTON wrote an elaborate and able dissenting opinion in support of that view. A rehearing has been granted, and we therefore defer the publication of the very lengthy opinions until the matter is finally determined.

THE Supreme Court of the State begins its term at Los Angeles on Monday next. The calendar of cases is a long one; but if the Court displays the same industry upon it as upon the calendar for this district, the bar of that locality will have no cause to complain respecting an opportunity to be heard upon the matters pending there.

WE are now issuing twenty-eight pages per week, chiefly of opinions of our Supreme Court. We will soon be well up with the Court, and then more space can be devoted to other important matter almost equally deserving of our immediate notice.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed March 13, 1880.]
[No. 5770.]

CHAPMAN, RESPONDENT, vs. QUINN, APPELLANT.

MEXICAN GRANTS—PUBLIC LANDS—PRE-EMPTION. Lands are not *public lands*, subject to pre-emption, private entry, or sale, as long as a claim under a Mexican grant is *sub judice*.

EVIDENCE—PATENTS—ADMISSIBILITY OF EVIDENCE ATTACKING PATENT. Evidence showing that there existed a claim to the lands in dispute under a Mexican grant at the date of the pre-emption, and which claim was *sub judice*, is admissible to show that the lands were not subject to pre-emption, notwithstanding a patent had been issued to the pre-emptor.

JURISDICTION OF STATE COURTS—AUTHORITY TO SET ASIDE DECISION OF REGISTER AND RECEIVER. The State Courts have power to examine a contested claim to a right of entry under the pre-emption laws, notwithstanding the decision of the Register and Receiver, confirmed by the Commissioner, where they have been imposed upon by *ex parte* affidavits and the patent procured by fraud.

IDEM—DISPOSAL OF PUBLIC LANDS. Where the title to lands has passed out of the United States by patent, it is no interference with the primary disposal of public lands by the Government for the State Courts to take jurisdiction and settle conflicting claims thereto.

PRACTICE—PARTY PLAINTIFF. Under the Act of Congress of March 3, 1843, in case of the death of the pre-emptioner before consummating his claim, the legal title, when the same is completed, vests in the heirs, and the lands form no part of the estate. Any one claiming under the heirs may maintain an action. The Probate system of the State has no application.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco.

Geo. A. Nourse, for respondent.
Jas. B. Townsend, for appellant.

THORNTON, P. J., delivered the opinion of the Court:

Chapman brought this action in the Nineteenth District Court to recover of defendant the undivided half of certain lots of land, situate in the city and county of San Francisco. The complaint is in the form usually adopted in the action styled in this State ejectment. The lots sued for are described in the complaint as lots four, five, and six, in section thirty-six, of township two south, range six west, from the Monte Diablo base and meridian. The defendant filed an answer, denying the allegations of the complaint, averring that the title to the lots sued for was in him, and also filed a cross-complaint, in which he averred, upon his information and belief, that under and by authority of the Act of Congress of the 3d of March, entitled "An Act to ascertain and

settle private land claims in the State of California," Josefa de Haro and others claiming to be and being heirs of Francisco de Haro, deceased, on the 16th day of March, 1852, filed before the Board of Commissioners created by said Act their petition and claim, wherein they asked for confirmation to them of a tract of land alleged to have been granted on or about the 27th day of September, 1835, by the Mexican authorities, to one Jose Antonio Galindo, and on or about the 12th day of May, 1837, conveyed by said Galindo to their said ancestor, de Haro; that said tract of land was known as the "Laguna de la Merced," and included the lots of land herein sued for; that by force of the laws of the United States, said tract of land was from the date of the filing of the said petion, the 16th of March, 1852, and down to the 19th day of March, 1868, reserved from sale or alienation, and excepted from the pre-emption laws of the United States; that such proceedings were had upon the said petition and claim of the said Josefa de Haro and others after the filing of the same; that said claim was finally confirmed to the claimants on the 13th day of January, 1858, by the decree of the District Court of the United States for the Northern District of California to the extent of one-half of a square Mexican league of land, to be located within the boundaries of the land set forth in said petition, but that the location of said half league was never ascertained not to cover or include the lots sued for, or any part thereof, until the —— day of ——, A. D. 1866, when such ascertainment was made by the judgment of the Supreme Court of the United States, a mandate of which judgment was filed in the said District Court of the United States on the 21st day of March, 1866; that no lawful plat or survey of township two, south of range six west, of the Mount Diablo base and meridian, which includes the said lots of land, made or approved by the United States Surveyor-General of California, was ever filed in the United States Land Office for the District of San Francisco, in which district said lots of land and said township are wholly situated, until the said 19th day of March, 1868, when said plat was duly filed in said office, showing said lots of land to be public land of the United States; that the whole of section 36 of said township two, south range six west, with the exception of the lots sued for, which lots amount to 56 7-100 acres, was and has been taken and covered by and included within the final surveys of the finally confirmed Mexican private land claims respectively known as the "Laguna de la Merced" and "San Miguel," and that in consequence of the whole of said section, with the exceptions

mentioned, being so taken, and lost to the State of California as school land, the said State had, prior to the settlement of this defendant upon said lots, taken, selected, and received other public land of the United States situated on the same land district, in lieu of the whole of said thirty-sixth section, which lieu selections, prior to such settlement by defendant, had been approved, and the land so selected certified over to the said State by the United States, whereby the title to said lieu selections became and still is vested in said State or its assignees as school land; instead and in lieu of said thirty-sixth section, said lots sued for became, and ever since have been and still are, public lands of the United States, and subject to its pre-emption laws.

That on the 5th day of February, 1869, the defendant having, as is alleged with fullness and particularity, all the qualifications of a pre-emptor, settled upon the lots sued for, which were at the time vacant and subject to pre-emption, claiming the same under the pre-emption laws of the United States, erected a dwelling house, and made other valuable improvements thereon, commenced to reside on, and has ever since continued to occupy, cultivate, improve, and reside on these lots; that within three months after his settlement he tendered to the Register of the Land Office at San Francisco, to be filed by said Register in his office, his declaratory statement in writing, signed by him and setting forth all the facts required by law, and at the same time tendered to this officer his lawful fees for filing this statement; that the Register refused to receive this document; that defendant appealed from this action of the Register to the Commissioner of the General Land Office of the United States, who, on the 29th of April, 1870, affirmed the action of the Register, and on his appeal to the Secretary of the Interior, this last named officer also affirmed the order of the Commissioner; that this defendant has not been allowed to make proofs of his claim to said lots, though since the tender of his declaratory statement, as above stated, he has offered to make such proofs by competent witnesses, and has offered to comply in all respects with the laws and the regulations of the Land Department; that on the 28th of January, 1871, he applied to the Register and Receiver at the Land Office in San Francisco to purchase said lots, and offered to pay the price therefor as fixed by law, and all costs and charges incident to the purchase, which application was refused by the officers mentioned; that plaintiff, shortly after the filing of the decision of the Supreme Court of the United States above mentioned, though he was not qualified as a pre-emptor, undertook to

obtain from the United States for his own use and benefit, fraudulently and by false testimony, and under the false pretense that one George Hollingsworth, then deceased, had in his lifetime settled upon, improved, and resided on the lots of land sued for, and had thereby acquired the rights of a pre-emptor to those lots, and that such rights of pre-emption had, by the death of said George, become vested in the widow and children of said George; that in execution of said purpose, plaintiff filed a petition according to law in the Probate Court of the city and county of San Francisco, asking for letters of administration upon the estate of said George, whose death is alleged to have occurred in November, 1855, leaving an estate in said county consisting of a pre-emption claim to the said lots; that, by order of the Court mentioned, plaintiff was appointed administrator of the estate of said George, and duly qualified as such on the 8th day of April, 1868; that on the same day plaintiff, as such administrator, and under color of said letters of administration, and in further prosecution of his illegal purpose, filed in the Land Office at San Francisco a paper purporting to be a declaratory statement under the laws of the United States, stating a settlement by his intestate in his lifetime on the lots in question and the improvement of the same under the pre-emption laws; that his said intestate resided thereon until his death, which took place in the city and county of San Francisco in the month of November, 1855, and that he left him surviving several children then living, on behalf of whom the declaratory statement was filed; that after the defendant had entered, settled, built a dwelling house and commenced to reside upon, and while he was residing upon the lots in question, claiming the same under the pre-emption laws, and after he had tendered to the Register his declaratory statement to be filed, and after the plaintiff had filed his said declaratory statement, the plaintiff, without notice to the defendant, or any appearance or contest by him, produced testimony before said Register and Receiver to the effect that said George Hollingsworth in his lifetime, and on or about the month of August, 1853, did settle, build a dwelling house on, cultivate and improve the said lots under the pre-emption laws of the United States, and did thenceforth and thereafter reside thereon, claiming the same under said laws down to the time of his death, and that said lots were during all of that time subject to pre-emption under said laws, and that said Hollingsworth thereby acquired, and at the time of his death possessed and held, a right of pre-emption to said lots, whereas in truth and in fact said testimony was false, and

was known by said Chapman to be so, and that said Register and Receiver, and said Commissioner of the General Land Office, and said Secretary of the Interior, were deceived and imposed upon by said false testimony, and said Register was thereby induced to and did refuse to file this defendant's declaratory statement, and to allow him to prove up and perfect his right and claim to said lots; and said Commissioner and Secretary were thereby induced to and did refuse to instruct said Register to file defendant's declaratory statement, and to allow him to prove up and perfect his right and claim to said lots under the pre-emption laws aforesaid, and to pay for and obtain a patent for the same, but, on the contrary, awarded said lots of land to said heirs of George Hollingsworth; that on the 28th day of January, 1871, the plaintiff paid to the Receiver of the Land Office at San Francisco, the purchase price of said lots, together with the fees of the Register and Receiver, and received a certificate of purchase of these lots; that thereafter, in 1871, he obtained a patent of the United States for the said lots, which was issued to the heirs of plaintiff's intestate, and that on or about the first day of May, 1871, and prior to the issuance of said patent, the plaintiff procured to be executed to him by said heirs a deed, purporting to convey to him an undivided half of their right and title in said lots, by virtue of which deed solely plaintiff seeks to recover on this action; that in truth and in fact said George Hollingsworth never did settle, build a dwelling house, or reside upon or cultivate said lots of land or any of them, or any part thereof, or ever claimed the same, or any part thereof, under the pre-emption laws of the United States or otherwise, which facts were well known to plaintiff at the time of his taking the proceedings before stated herein; that said land was not at any time during the lifetime of said George subject to pre-emption, nor could any right thereto be acquired under or by virtue of the pre-emption laws of the United States in any manner, or by any person whatsoever; that plaintiff has not, and never had, any title whatsoever to said lots, or any part thereof, except such as was, as aforesaid, fraudulently acquired and obtained by him under and by means of said proceedings and said patent; that for the reasons herein set forth the plaintiff should be held and adjudged a trustee for the defendant, and be compelled to convey to this defendant the title thus fraudulently acquired. Wherefore the defendant asks that the plaintiff be decreed a trustee for him, and that the Court compel him to convey to him the title acquired by plaintiff under the proceedings above set forth.

The matters set up in this cross-complaint were also pleaded as a separate defense to the action, styled herein the third defense.

The plaintiff answered the cross-complaint, and denied all the allegations of fraud therein contained, and denied that the lots sued for embraced within the limits of the tract of land as claimed by Josefa de Haro and others.

The cause came on for trial before the Court, a jury having been waived. Judgment was rendered for plaintiff. A new trial was moved for and denied. Defendant prosecutes this appeal from the judgment and order just mentioned.

The plaintiff offered testimony, by which he made out his case *prima facie*, and rested. It was then admitted that the title to the land in dispute never vested in the State of California. Whereupon the defendant, to sustain his defense and cross-complaint, offered to give in evidence the original record in the case of Josefa de Haro and others against the United States, being docket No. 380 of the United States District Court for the State of California, said case having been commenced before the United States Commission appointed by and which sat under the Act of Congress approved March 3, 1851, entitled "An Act to ascertain and settle the private land claims in the State of California;" and said defendant offered to prove by said record that the said Josefa de Haro and others filed their petition and claim before said Board of Land Commissioners on the 16th day of March, 1852, claiming certain lands therein described by metes and bounds, courses and distances, claiming the same under a grant from the former Mexican Government, made September 27, 1835, of said tract of land under the name of "Laguna de la Merced," and to prove thereby that said tract of land was confirmed to said Josefa de Haro and others by said Board of Land Commissioners, on the 24th day of July, 1855; and thereafter an appeal to said United States District Court, duly prosecuted, was by said District Court confirmed to said Josefa de Haro and others, on January 13, 1858, and that on the filing of the written statement of the United States Attorney-General that the appeal from said decree of said District Court would not be prosecuted by said United States, the said appeal was, by said District Court, on March 19, 1858, dismissed and the decree of said District Court made final, and said claimants allowed to proceed thereon as upon final decree in their favor; and that proceedings were thereafter taken according to law for the survey and segregation of the land so confirmed to said Josefa de Haro and others, but that such

segregation never was made until January 10, 1868, when a plat of survey of said Mexican grant so confirmed, and known as the "Laguna de la Merced," was by decree of said United States District Court finally confirmed, by which survey the land now in dispute in this action was first excluded from the land so confirmed to Josefa de Haro and others; and said defendant offered to prove by competent testimony that the land now in dispute in this action was always included in and a part of the said claim of Josefa de Haro and others, as originally made in their said petition filed before the Board of Land Commissioners, and as confirmed by said Land Commissioners and by said District Court, and as existing down to January 10, 1868, when by final segregation said three fractions in dispute, lots four, five, and six, were excluded from said Mexican grant, "Laguna de la Merced," so confirmed to said Josefa de Haro and others.

When this offer was made it was admitted that the defendant possessed the qualifications to pre-empt, and occupied the status toward said lots which are set out in his third defense and cross-complaint. The plaintiff objected to the admission of the record and testimony offered by the defendant on the following grounds:

First. That the defendant cannot attack the patent of the United States given in evidence by plaintiff.

Second. That it did not lie in defendant's mouth to say that the land in dispute was not open to pre-emption at the time that George Hollingsworth is alleged to have settled thereon.

The admissibility of this evidence seems to have been argued at great length by the Court below. During the argument, in reply to a question by the Court, the counsel for defendant stated that his offer of said evidence was made for the purpose of showing that the land now in dispute was reserved from the acquisition of any pre-emption rights therein from March 16, 1852, down to the time when the survey of said ranch "Laguna de la Merced" was finally approved by the United States District Court, at which time the land in dispute was for the first time excluded from said ranch; that said lots were included in the tract described in the petition and claim of Josefa de Haro and others, down to the time of approval of the final survey of said tract, which had been confirmed to said Josefa and others, and that said lots were included within said tract confirmed until they were excluded on the final survey above referred to.

The counsel for defendant having made this statement, plaintiff's counsel stated further objections to the offer, viz.:

First. That the question of fact whether or not the land now in dispute was subject to pre-emption at the time George Hollingsworth made his settlement upon it, has been disposed of as a question of fact by the Register and Receiver of the United States Land Office at San Francisco, and by the Commissioner of the General Land Office and the Secretary of the Interior.

Second. The complaint does not allege that any error of law was made by said land officer or any of them in their decisions preliminary to the issuing of the patent now in evidence.

Third. That there is no evidence upon the point of the alleged fraud and imposition claimed to have been practiced upon said Register and Receiver, Commissioner, and Secretary, and claimed to have influenced them in their said decision.

Fourth. That it does not appear that any evidence whatever upon that point was offered by said Chapman or the heirs of said George Hollingsworth before said Register and Receiver. The Court sustained these objections, and defendant excepted.

The object for which the foregoing offer was made was clearly explained by the counsel for defendant, to show in fact that the land sued for was not public land until the final survey of the rancho "Laguna de la Merced" was made and approved, and until that time was withdrawn from entry, sale, or settlement as public land; wherefore the settlement of Hollingsworth, having been made in 1853, after the claim for said lots was presented to the Land Commission, was of no validity.

To sustain the exception under consideration, we are referred to *Newhall* vs. *Sanger*, 92 U. S. S. C. Rep. 761. That case was instituted in the Circuit Court of the United States for the District of California, and was brought by Sanger to determine the ownership of a quarter section of land, situated in this State, against Newhall. Sanger claimed title through the Western Pacific Railroad Company, to whom a patent was issued in 1870, under the provisions of the Acts of Congress commonly known as the Pacific Railroad Acts. Newhall derived title by mesne conveyances from one Dayton, the holder of a patent of a later date, which recited that the land was within the exterior limits of a Mexican grant called Moquelemos, and that a patent by mistake had been issued to the railroad company. The Court below decreed in favor of Sanger that he was the owner of the disputed premises, and that the junior patent,

so far as it related to said premises, should be canceled. From this decree an appeal was prosecuted to the Supreme Court of the United States; that Court reversed the decree, and directed that the bill should be dismissed.

The title of the railroad company, under which Sanger attempted to make good his suit, was claimed to have been derived under the Act of Congress of July 1, 1862. (See 12 Stat. at Large, 492.) This Act grants to certain railroad companies, of which the Western Pacific by legislation afterwards enacted became one, every alternate section of public land designated by odd numbers, within ten miles of each side of their respective roads, not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road is definitely fixed. A map designating the general route of each road was to be filed in the Department of the Interior within a period designated according to the requirements of the Act referred to, and then it was made the duty of the Secretary of the Interior to cause the lands within a certain distance from such route to be withdrawn from pre-emption, private entry, and sale. Such proceedings were had that the withdrawal for the road mentioned was made on the 31st of January, 1865. The Moquelemos grant had been regularly presented to the Board of Commissioners under the Act of the 3d of March, 1851 (before referred to in this opinion), and was duly prosecuted by appeal, and was rejected by the Supreme Court of the United States on the 13th of February, 1865. It was conceded that the lands embraced by it fell within the limits of the railroad grant above referred to. By the withdrawal mentioned, the grant took effect upon such odd numbered sections of *public lands* within the specified limits as were not excluded from its operation. On these facts, says Davis, J., delivering the opinion of the Court: "The question arises whether lands within the boundaries of an alleged Mexican or Spanish grant, which was then *sub judice*, are *public* within the meaning of the Acts of Congress under which the patent was issued to the railroad company."

The Court then proceeds to discuss this question, and arrives at the conclusion and holds that these lands were not public lands—that is, not subject to pre-emption, private entry, or sale, as long as the claim under a Mexican grant was *sub judice*.

It may be remarked here that the Moquelemos grant was rejected, and held not to be a valid claim. In legal effect this was holding it never to have been granted. This fact

did not escape the attention of the Court. Reference is obviously made to it in these words: "This section (the Court here refers to the sixth section of the Act of the 3d of March, 1853, introducing the United States land system into California, 10 Stat. at Large, 246) expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said this means 'lawfully' claimed; but there is no authority to import a word into the Statute in order to change its meaning." (92 U. S. Rep. 765.)

But whether the Court was right or wrong on this point, in the case of the grant for the "Laguna de la Merced," the claim was declared valid; and having been so declared, it was *lawfully claimed* when it was presented to the Board of Land Commissioners.

In a later case, *Van Reynegan* vs. *Bolton*, 95 U. S. Rep. 33, the Supreme Court held that lands claimed under Mexican grants in this State are restricted from settlement so long as the claims of the grantees remain undetermined, and that such claims were undetermined until a final survey was made and approved by the proper officers of the United States. This was so held against defendants, who claimed under the pre-emption laws of the United States, after the final confirmation of the grant and while a contest was going on as to the survey of the land confirmed. (See also *Rutledge* vs. *Murphy*, 51 Cal. 393.)

In accordance with the decisions above referred to, we are of opinion that the Court erred in excluding the evidence offered by the defendant. Defendant had a right to have the evidence admitted for the purpose of making proof of the facts, to show which his counsel stated to the Court he made the offer.

In consequence of this error, the cause must be remanded to the Court below to be tried anew. It is therefore proper to examine the other errors assigned in the rulings of the Court, as the same questions may arise on the new trial.

Defendant, in the progress of the trial, called as a witness one J. G. Knowles, and offered to prove by him that George Hollingsworth never settled on the land now in dispute for himself; that he never fenced nor cultivated any part of said land; that whatever he did upon said land was done for his brother, B. S. Hollingsworth, and because the said B. S. Hollingsworth desired to take up the claim as a pre-emptor of said land, but was unable to do so in his own name; that all that was done upon said land was the inclosing of the same by the said B. S. Hollingsworth; that subsequent to said George Hollingsworth's death, said B. S. Hollings-

worth, in his own name, leased said land to said witness, and that said witness held said land under B. S. Hollingsworth for some years thereafter, and that the setting up of a pre-emption claim to said land in the name of said George Hollingsworth, deceased, was from its inception a fraud upon the United States. To the admission of which in evidence said plaintiff objected, on the ground that there is nothing in the pleadings to justify any such evidence, and that said evidence was irrelevant, immaterial, and incompetent. The Court sustained said objections and refused to receive said evidence, to which refusal said defendant then and there excepted.

In the cross-complaint, and in the third defense set up in the answer, defendant had pleaded that the officers of the Land Department of the United States had been deceived and imposed upon by false testimony in relation to the settlement by George Hollingsworth in his lifetime upon the lots in controversy, and in relation to said Hollingsworth's building a dwelling house, cultivating and improving and residing on said lots. He had also set up, in the pleadings referred to, that the statements as to the settlement, building, cultivating, and improving, and residing on said premises were false, to the knowledge of the plaintiff, who, it seems, procured the testimony in regard to these matters to be adduced before the Register and Receiver of the Land Office at San Francisco. In consequence of this fraud and deception alleged to be practiced on the land officers of the United States, defendant's rights had been prejudiced.

Knowles was produced as a witness by defendant, and the offer was made to show by him facts which tended to prove the truth of the allegations of the third defense, and of the cross-complaint just above referred to.

The cases justifying the admissibility of this evidence, and showing its exclusion to be error, are numerous. We will refer to some of them:

In *Garland* vs. *Wynn*, 20 How. U. S. Rep. 6, which came before the Supreme Court of the United States by writ of error to the Supreme Court of Arkansas, it appears that in November, 1842, Wynn proved that he had a preference right of entry to the quarter section of land in dispute, according to an Act of Congress of 1838, and his entry was allowed.

In February, 1843, Hemphill offered proof that he had an elder right to the same land, under an Act of Congress passed in 1830. The Register and Receiver decided in favor of Hemphill, set aside Wynn's entry, refunded the purchase

money to him, and awarded a patent certificate to Hemphill, who assigned it to Garland, who was defendant in the Court below. Wynn brought his action against Garland, and the benefit of the patent was decreed to Wynn by the Supreme Court of Arkansas.

It appeared, from the allegations and evidence, that Garland and Hemphill, acting together, practiced an imposition by false testimony on the land officers. (See report of case, where the fraud is fully set forth.)

Garland pleaded that by law the Circuit (State) Court had no authority or jurisdiction to set aside or correct the decision of the Register and Receiver, and that their adjudication was final and conclusive. The same contention is made here on behalf of Chapman, the plaintiff.

The Court affirmed the judgment of the Supreme Court of Arkansas. It said (opinion by Catron, J.): "The question is, have the courts of justice power to examine a contested claim to a right of entry under the pre-emption laws, said to overrule the decision of the Register and Receiver, confirmed by the Commissioner, in a case where they have been imposed upon by *ex parte* affidavits, and the patent has been obtained by one having no interest secured to him in virtue of the pre-emption laws, to the destruction of another's right who had a preference of entry, which he preferred and exerted in due form, but which right was defeated by false swearing, and fraudulent contrivance brought about by him to whom the patent was awarded? The general rule is, that where several parties set up conflicting claims to property, with which a special tribunal may deal as between one party and the Government, regardless of the rights of others, the latter may come into the ordinary courts of practice and litigate the conflicting claims. Such was the case of *Comegys* vs. *Vasse*, 1 Peters, 212, and the case before us belongs to the same class of *ex parte* proceedings; nor do the regulations of the Commissioner of the General Land Office, whereby a party *may* be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. We announce this to be the settled doctrine of this Court. It was in effect so held in the case of *Lytle* vs. *The State of Arkansas*, 9 How. 328; next in the case of *Cunningham* vs. *Ashley*, 14 How.; and again in the case of *Bernard* vs. *Ashley*, 18 How. 44."

These questions were again discussed at length, and with marked clearness and ability, by Miller, J., in *Johnson* vs. *Townsley*, reported in 13 Wall. 72. In that case it is held (and the decision has been followed ever since), that when the

officers of the United States Land Department decide controverted questions of fact, *in the absence of fraud, or impositions, or mistake*, their decision on such questions is final, except as they may be reversed on appeal in that Department; but that where, on the application of the facts as found by such officers, they *by misconstruction of the law* take from a party that to which he has acquired a legal right under the sanction of the law, a court of equity can give relief. (See *Lytle* vs. *Arkansas*, 22 How. 192–196; *Lindsey* vs. *Harris*, 2 Black. 194; *Minnesota* vs. *Batchelder*, 1 Wall. 109; *Stark* vs. *Starrs*, 6 Wall. 402; *Silver* vs. *Ladd*, 7 *Id.* 219; *Hosmer* vs. *Wallace*, 47 Cal. 461; *Hess* vs. *Bolinger*, 48 *Id.* 353; *Rutledge* vs. *Murphy*, 51 Cal. 391.)

We are of the opinion that the cases above cited lay down correct rules; that under those rules the Court erred in excluding the offer of the defendant above stated.

Near the close of the trial, and after it had occupied the attention of the Court for several days, the defendant's counsel stated to the Court that, in consequence of the rulings of the Court, it would be impossible to make out his defense or his case under the cross-complaint. Counsel for plaintiff stated that he would waive all objection to any proof which the defendant might offer in support of the charges, and each of them, made in the answer and cross-complaint, of fraud and wrong-doing on the part of plaintiff. This was made some days after the rulings considered herein had been made.

To this the Court made no response, and it does not appear that any notice was taken of it by defendant's counsel.

As the Court took no action on this proposition, we do not think the counsel for defendant was called upon to say or do anything in regard to it, or that any waiver of any exception reserved by defendant was, under the circumstances, made by him.

On the argument, it was earnestly contended on behalf of plaintiff that neither the Court below nor this Court had any jurisdiction of the subject matter of the third defense and cross-complaint, on the ground that the State of California was admitted into the Union upon the express "condition that the people of said State, through their Legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits," and that in this litigation an attempt is made by defendant to have the State Courts do that which the people of this State are forbidden to do in any way or manner by the Act of admission.

We do not see here any interference with the primary disposal of the public lands. The title has passed out of the

United States by the patent. If this were not so, plaintiff himself could have no standing in Court. The patent is his sole reliance for a recovery. Said the Supreme Court of the United States in *Bagnall* vs. *Broderick*, 13 Peters, 450, speaking of the patent for lands issued by the United States: "Until its issuance, the fee is in the Government, which by the patent passes to the grantee."

It was also held in the same case that where the title had passed out of the United States by conflicting patents, there can be no objection to the courts of a State giving effect to the better right, in any form of remedy the Legislature or the courts of the State may adopt.

We can see no substantial distinction in the case, where the title of the United States has passed out of it by a single patent or by conflicting patents, inasmuch as the first patent always carries the title, and must, as a general rule, prevail, unless countervailed by equitable considerations.

We can see no difficulty on the point of jurisdiction which was raised and argued by plaintiff's counsel. In our opinion the United States had made a primary disposal of the land sued for by the issuance of its patent to the heirs of Hollingsworth when this action was commenced, and there has been no interference with this right.

A question is made by defendant as to the right of plaintiff to maintain this action, the administration of the estate of Hollingsworth not having been closed.

But under the Act of Congress of March 3, 1843 (see second section of this Act, 5 Stats. at Large, 620), in case of the death of the pre-emption settler before consummating his claim, the right is given to the executor, administrator, or one of the heirs "to file the necessary papers to complete the same." The Act then goes on to provide "that the entry in such case shall be made in favor of 'the heirs' of the deceased pre-emptor; and a patent thereon shall cause the title to inure to said heirs, as if their names had been specially mentioned."

The legal title thus vests in the heirs. The land was never a part of the estate of plaintiff's intestate.

The plaintiff claims the interest sued for under a conveyance from the heirs. He can, then, maintain the action. The Probate system of the State has no application to the case.

For the errors above pointed out herein, the judgment of the Court below and its order denying a new trial are reversed, and the cause remanded to the Superior Court of the city and county of San Francisco for a new trial, in accordance with the views expressed in this opinion.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT NO. 2.

[Filed March 19, 1880.]

[No. 5601.]

VIGOUREX, APPELLANT, vs. MURPHY, RESPONDENT.

EXECUTIONS—SHERIFF'S SALES—OF LOTS EN MASSE. A sale in mass, under a writ of execution, of several known and distinct parcels is not *void*, but *voidable*.

REMEDY OF JUDGMENT DEBTOR. The judgment debtor must make application to set the sale aside within a *reasonable* time.

LACHES—REASONABLE TIME. An application for such relief made more than three years after the sale is not within a reasonable time; and a knowledge of the recovery of the judgment, the issuance of the execution, and the advertisement of the sale is equivalent to an actual knowledge of the sale.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

L. C. Pettinos, for appellant.

Lloyd & Newlands, for respondent.

THORNTON, P. J., delivered the opinion of the Court:

The plaintiff (appellant here) brought this action to recover the possession of land in the city and county of San Francisco, which he described as one parcel by metes and bounds, concluding with these words: "Being lots numbers 463, 464, 465, 466, as laid down on Gift Map No. 2, on file in the Recorder's office of the city and county of San Francisco, State of California." The complaint was in the usual form adopted in this State for the recovery of possession of real property.

The defendant answered, denying all the material allegations of the complaint, except possession by him; and for a further answer and cross-complaint averred that he was the owner and in possession of the lots sued for, and has been the owner and in possession of them since the 14th day of April, 1875; that the property was on said day last named divided into four lots, and then known as lots by the numbers above stated, and so designated on a map entitled "Gift Map, No. 2," recorded in the Recorder's office of the city and county of San Francisco; that on two of these lots there was on said day, and ever since has been and now is, a large frame house of the value of $800, the same being the homestead of defendant and his family; that on or about the 21st day of March, 1873, A. Scholle caused an execution to be issued on a judgment recovered by said Scholle against defendant about the 8th of March, 1873, in the Justices'

Court of said city and county, for the sum of $68.40, and $14.25 costs of suit; that the Sheriff on the 18th day of April, 1873, sold these lots under said execution in one entire mass to Scholle for the sum of $100.35, and at the same time executed to Scholle a certificate of sale; that the Sheriff and Scholle at the time of sale knew of the division into four separate lots. Defendant further knew that at the time of sale these lots were each of the value of $150 gold coin, and the entire property was then of the value of $1,500; that the Sheriff sold all of them for $100.35—a sum much less than the value of one of the lots, as the Sheriff and Scholle then knew; that afterwards, about the 20th December, 1873, Scholle sold and assigned his certificate of sale to the plaintiff, who knew that the property was divided and sold *en masse* as above stated, and that about the 10th day of March, 1874, the Sheriff executed a deed of the lots to the plaintiff; that on the 20th of May, 1876, defendant offered in writing to pay to the plaintiff the amount of said judgment and the costs due on the judgment and sale, and interest on the same, amounting to $132.06 in United States gold coin, which offer plaintiff refused; that defendant is now, and has been since the offer was made, ready and willing to pay said sum to plaintiff, and brings it into Court and tenders it to plaintiff. The prayer of the cross-complaint is that the sale may be set aside, and plaintiff be compelled to convey the lots to defendant, and for such other relief as to the Court may seem meet, and for costs.

The plaintiff answered the cross-complaint, denying all the allegations thereof, except that the Sheriff sold the property *en masse* under the judgment and execution as stated, and the offer in writing to him made by defendant on the 20th day of May, 1876. The cause was tried by the Court, the parties having waived a jury trial. The Court found the facts, and rendered judgment for defendant. From this judgment plaintiff appeals.

The complaint in this action was filed and summons issued on the 28th of March, 1876. On the 17th of June, 1876, defendant filed his answer and cross-complaint, and on the 30th of August, 1876, plaintiff filed his answer to the cross-complaint.

The Court found as facts that on the 18th of April, 1873, and long prior thereto, the defendant owned and claimed in his own right and possessed the real property as described in the complaint; that defendant in 1871 built a house on two of the lots mentioned, worth about $800, and that ever since 1871 defendant and his family have occupied and re-

sided on said lots; that each of said lots was worth from $75 to $100, and had a frontage of 25 feet and a depth of 70 feet; that one A. Scholle recovered a judgment in the District Court, as set out in the cross-complaint; that execution on the judgment was issued on the 21st day of March, 1873, and on the same day was levied by the Sheriff of the city and county of San Francisco, and that the Sheriff on the 18th of April, 1873, sold the four lots *en masse* at public auction for $100.35 to Scholle, and gave him a certificate of sale therefor.

The return of the Sheriff was found by the Court *verbatim*. It sets forth a levy by virtue of the execution on the judgment above mentioned, which had been previously attached in the same cause, upon the interest of the defendant in the property described as in the complaint, on the 1st day of March, 1873, the day on which the same property was attached in the same action, to be sold by him (the Sheriff) in front of the City Hall, in the city and county of San Francisco, on the 18th of April, 1873, at 12 o'clock, noon; that previous to said sale (the Sheriff further returns), "I caused due and legal notice thereof to be published once in each week for three weeks successively, immediately before said sale, in the *Daily Examiner*, a daily newspaper published in the city and county of San Francisco, for the same period preceding such sale," and that he sold the same on the 18th of April, 1873, in one parcel to A. Scholle, at public auction, according to law, for cash, the said Scholle being the highest bidder therefor, for $100.35 in lawful money of the United States, which was paid him by Scholle, and that he delivered to Scholle a certificate of sale therefor, and filed a duplicate of the same in the office of the County Recorder in and for the city and county of San Francisco; that he deducted from the sum above mentioned his commissions and expenses, $14.50, and applied the balance, $85.85, in full satisfaction of the execution. The Court proceeds further to find that the Sheriff sold said lot *en masse*, and that the notice of the sale contained a description of the lot as stated above in his return; that the property was at the time of the sale, and long prior thereto, divided into four lots, was worth about $1,100, and that these lots have ever since 1871 been inclosed by a high fence, without anything on the property to show that it was divided into lots. The Court finds the assignment of the certificate of sale by Scholle to plaintiff; the execution of a deed by the Sheriff to plaintiff of the lots in question on the 10th of March, 1874; that plaintiff has never been in possession of these lots or any of them, and that "the defendant did not actually know of said sale until

January, 1876." On these facts the Court held as conclusions of law that the defendant is the owner of the lots, that the sale by the Sheriff was and is illegal, and that the deed executed by the Sheriff is illegal and void, and that plaintiff is entitled to a judgment for costs; which judgment was entered accordingly, except that the judgment as entered gave the defendant costs.

There is no doubt that a sale in mass, under a writ of execution, of real estate consisting of several known and distinct parcels, at a price greatly below the actual value of the property, cannot be sustained against the objection of the judgment debtor. Such sales are not *void*, but are *voidable*, and will be set aside upon a proper application by the judgment debtor, when made in a reasonable time after such sale, where there is ground in reason for belief that it was less beneficial to the judgment creditor or debtor than it would have been had the sale been made of the separate parcels. (*San Francisco* vs. *Pixley*, 21 Cal. 57; see *Page* vs. *Randall*, 6 *Id.* 32.)

The statute makes it the duty of the Sheriff to sell such property, when it consists of "several known lots or parcels, separately." (C. C. P., section 694.) It also provides that the judgment debtor, if present at the sale, may also direct the order in which such property may be sold, "when such property consists of several known lots or parcels," and the Sheriff is bound to follow his direction. (C. C. P., section 694.)

The section of the Code of Civil Procedure just referred to is identical with section 223 of the Practice Act, which was in force when and under which *San Francisco* vs. *Pixley*, above cited, was decided. The Court, nevertheless, held the sale in that case, which was a sale of real property, consisting of several known lots or parcels, *voidable* and not *void*. This decision meets our approval.

The sale then should be set aside if the application was made by the defendant to set it aside in a reasonable time after it was made. If the application had been made immediately on the return by the Sheriff, it should have been vacated; and *perhaps* such should have been the decision of the Court had an application been made by the judgment debtor within the period of redemption. But in the case under consideration such application was not made until more than three years after the sale. We did not see that any such resort was had until the cross-complaint was filed herein, and this did not occur until the 17th day of June, 1876—the sale having been made on the 18th of April, 1873.

In our opinion, the defendant did not apply for such relief within a reasonable time.

It may be said that this *laches* on the part of the defendant is accounted for by the fact, which is found by the Court, that the defendant did not actually know of the sale until January, 1876. It will be observed, however, that this is not set up by the defendant anywhere in the answer or cross-complaint, nor is it pleaded or found that the defendant was not aware of the recovery of the judgment on the 8th of March, 1873, on which day the execution issued, of the issuance of the execution on this judgment on which the sale was made, and of the advertisement of sale by the Sheriff. These facts were sufficient to put him on inquiry, which inquiry, if it had been pursued properly, would have given him timely notice of the sale. A knowledge of these facts was in legal effect equivalent to a knowledge of the sale.

The judgment of the Court below is reversed, and the cause is remanded to the Superior Court of the city and county of San Francisco, with directions to vacate the judgment for the defendant, and to enter a judgment on the findings for the plaintiff.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT NO. 2.

[Filed March 19, 1880.]

[No. 6124.]

MALLETT, RESPONDENT, VS. SWAIN, APPELLANT.

AN EXCEPTION TO REFUSAL OF INSTRUCTIONS must be taken at the time of the ruling, and before the jury retires.

A VERDICT OF A JURY will not be disturbed where there is a substantial conflict in the evidence.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco.

The plaintiff had judgment, and the defendant, having been denied a new trial, appealed.

S. W. Holladay and *J. A. Waymire*, for appellant.

Lloyd Baldwin, for respondent.

MYRICK, J., delivered the opinion of the Court:

This case was tried before a jury. After the arguments were concluded, defendant's counsel asked the Court to give two certain instructions to the jury. The Court refused to give the instructions. The Court then proceeded to give instructions; the jury then retired, and immediately afterward

defendant's counsel asked the Court to note an exception to the refusal to give the instructions asked. Plaintiff's counsel objected that the exception should have been taken before the jury retired, and the objection was sustained. This refusal to give the instructions is assigned as error.

It is not necessary to pass upon the correctness of the instructions. The statute requires that an exception be taken at the time of the ruling. This was not done. It was not error, therefore, for the Court to refuse to note an exception at a subsequent time. There was ample time after the ruling, and before the jury retired, to have taken an exception.

The other matters referred to in the transcript were matters of fact, which were necessarily considered by the jury and passed upon by them. There was a substantial conflict in the evidence, and the Court below denied defendant's motion for a new trial.

Judgment and order denying motion for new trial affirmed.

We concur: Thornton, J., Sharpstein, J.

DEPARTMENT NO. 2.

[Filed March 18, 1880.]

[No. 6411.]

HENEY, RESPONDENT, vs. SARGENT, APPELLANT.

HUSBAND AND WIFE—WHEN WIFE MAY BIND HUSBAND BY HER CONTRACT. Until a divorce or separation by agreement, as provided by section 175 of the Civil Code, the wife is entitled to be supported by the husband, though living apart; and her contract for necessary furniture for fitting up some other house than that of the husband's, binds him.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

J. G. Severance, for appellant.

Cowdery & Preston, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an action to recover the value of furniture sold and delivered. Defendant and his wife were living apart, he having rented a house for the use of herself and their son. She purchased the furniture in the name of her husband, stating that she was authorized by him so to do. Defendant denied the authority. The only question was as to whether he had in the first instance given the authority, or had subsequently ratified her acts. The evidence shows that they were living apart, but not by agreement as contemplated by

section 175, C. C.; that he had supplied her with some kitchen furniture, and that the furniture was purchased to furnish the house. The husband was occasionally at the house. While the furniture was being delivered he knew of the fact, and made no protest. When this suit was brought the same furniture was attached. In order to obtain a release of the property from attachment, the attorney of the wife obtained the consent of the husband that he enter his appearance in the case, saying that the property could not be released until an appearance had been entered. The attorney then gave a bond, and the property was released.

In the Court below plaintiff had judgment; defendant moved for a new trial, which was denied; he then appealed.

We think there was sufficient evidence of authority to sustain the finding. The husband, according to his own testimony, was making some provision for his wife and son—viz., renting a house. They could not have lived there very comfortably without furniture; and when the tradesman furnished her with these goods, he did so on the implied authority which the wife carries with her. Until a divorce or separation by agreement, she was entitled to be supported by him either at his house or at some other place.

Judgment and order affirmed.

We concur: Morrison, C. J., Sharpstein, J.

[Filed March 19, 1880.]

[No. 10,497.]

EX PARTE JAMES TOLAND ON HABEAS CORPUS.

CRIMINAL LAW—TRANSFER OF CASES TO SUPERIOR COURT—POWER OF THAT COURT TO ENFORCE ITS JUDGMENT. Where a person had been convicted of a crime in the City Criminal Court, and had appealed to the County Court, and during such appeal said courts were abolished by the Constitution, the cause was, by operation of that instrument, transferred to the Superior Court, and said Court has full power and authority to issue any and all process necessary to the execution of its judgment.

Petition for writ of *habeas corpus*.

M. S. Horan, for petitioner.

———— for respondent.

The petitioner, James Toland, was tried in the City Criminal Court within and for the city and county of San Francisco on the charge of "battery," and was duly convicted on the 24th of July, 1879. On such conviction, and as a punishment for said offense, the City Criminal Court imposed a fine of $150; and in case said fine was not paid, ordered

said Toland to be imprisoned in the county jail for the period of 75 days. From this judgment an appeal was taken to the late County Court of said city and county, and there the case was pending, undetermined and undecided, on the 1st day of January, 1880.

On the 3d day of February, 1880, by an order of the presiding Judge of the Superior Court of said city and county, the appeal was assigned to Department No. 11 of said Superior Court, presided over by the Hon. T. W. Freelon; and on the ninth day of that month the judgment of the City Criminal Court was affirmed by the said Superior Court.

On the 26th day of February a bench warrant was duly issued out of said Superior Court, and thereupon petitioner was arrested, and is now in the custody of the Sheriff of said city and county.

Application is now made for the discharge of said Toland on *habeas corpus*, on the ground that the process under which he is held in custody by the Sheriff was issued without authority of law, and is therefore void.

In support of this view, counsel for petitioner relies upon section 1470 of the Penal Code, which provides that "if the appeal is dismissed or the judgment affirmed, a copy of the order of dismissal or judgment of affirmance must be remitted to the Court below, which may proceed to enforce its sentence." In the present case this cannot be done, as the "Court below" has gone out of existence under the provisions of the new Constitution, and therefore, it is argued, the prisoner should be discharged.

It would be a misfortune if such were the case. The guilt of the defendant was determined by the verdict of a jury in the City Criminal Court, and the judgment rendered upon such verdict has been sustained by the Appellate Court; yet it is claimed that the machinery of the courts is left insufficient under the operation of the new Constitution to enforce the judgment. The Court will endeavor to find an escape from such a conclusion, and in this case there is no real difficulty in doing so.

Section 1 of Article XXII of the Constitution declares "that all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted." And section 3 of the same article provides

that "all courts now existing, save Justices' and Police Courts, are hereby abolished; and all records, books, papers, and proceedings from such courts as are abolished by this Constitution shall be transferred on the first day of January, eighteen hundred and eighty, to the courts provided for in this Constitution; and the courts to which the same are thus transferred shall have the same power and jurisdiction over them as if they had been in the first instance commenced, filed, or lodged therein."

On the first day of January, 1880, the County Court of the city and county of San Francisco went out of existence, the Superior Court succeeding to its powers and jurisdictions. The case now under consideration was then properly before the Superior Court, and that Court had the same power and jurisdiction over it as it would have had if the case had been in the first instance "commenced, filed, or lodged therein."

I am of opinion that the Superior Court had full power and authority to issue any and all process necessary to the execution of its judgment, and therefore the petitioner is in lawful custody.

Writ discharged, and petitioner remanded.

R. F. MORRISON, Chief Justice.

DEPARTMENT NO. 2.

[Filed March 17, 1880.]

[No. 6389.]

WILLIAMS ET AL., RESPONDENT,

vs.

HILL, APPELLANT.

CONFLICT OF EVIDENCE—JUDGMENT NOT DISTURBED—FINDINGS—WHEN SUFFICIENT.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Edward R. Taylor, for appellant.

G. W. Gordon, for respondent.

MYRICK, J., delivered the opinion of the Court:

Plaintiff had judgment; defendant moved for a new trial, which was denied; and defendant appealed.

On the trial in the Court below, plaintiff Williams testified as to the amount due plaintiff from defendant on account of advances, and that the agreement, signed by defendant, ending the joint adventure, was drawn according to their verbal

understanding. Defendant testified that it was not according to their understanding. Here was a direct conflict of evidence. The Court below found in favor of plaintiff, and rendered judgment accordingly. In such case this Court will not disturb the judgment.

The objection that the findings do not support the judgment, in that the Court did not find as to the alleged mistake, is fully answered by the finding of the Court "that all the facts set forth in the complaint are true;" and by the fourth finding, "the facts set forth in the complaint (transcript folios 9 to 11) are entirely inconsistent with the mistake alleged in the answer." If the allegations of the complaint are true, there could be no such mistake.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, P. J.

DEPARTMENT NO. 2.

[Filed March 16, 1880.]

[No. 6506.]

EMILE SCHIRMER, RESPONDENT,

vs.

J. T. HOYT ET AL., APPELLANTS.

STREET ASSESSMENT—DEMAND, WHEN INSUFFICIENT. A demand for one sum of money, the same being the aggregate amount of the assessments upon two or more lots, is insufficient. The demand should have been made on each lot for the amount assessed thereon.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

D. H. Whittemore, for appellant.

Fisher Ames, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This is an action on a street assessment. Plaintiff had judgment in the Court below; defendant moved for a new trial, which was refused; and the appeal is from both the judgment and the order denying the motion for a new trial. There is but one question in the case, and that relates to the sufficiency of the demand.

It appears from the diagram accompanying the assessment that the lots numbered 5 and 18 were assessed, the former for $137.85 and the latter for $9.55. The return shows that a demand for an aggregate sum was made on the two lots. It is as follows:

"N. Provo Flint, being duly sworn, deposes and says that he is the collector of Emile Schirmer, assignee of the con-

tractor named in the annexed assessment list and warrant; that since the date of said warrant—to-wit, on the 3d day of November, 1876—and by virtue thereof, he went upon each of the lots exhibited upon the diagram attached to said assessment list and warrant, and numbered respectively 1, 2, 5, 18, etc.; and while on said lot on said day, in an audible tone of voice, etc., he publicly demanded on each lot of land the payment of the sum assessed to each in said assessment list respectively. That is to say, while on lot No. 1 he demanded payment of the sum of $137.85; No. 2, $77.20; Nos. 5 and 18, $144.94."

The demand in this case was made upon lots 5 and 18 for one sum of money, the same being the aggregate amount of the assessments on the two lots, and was therefore insufficient. The demand should have been made on each lot for the amount assessed thereon. (*Dyer* vs. *Chase*, 52 Cal. 440.)

Judgment and order reversed.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT NO. 2.

[Filed March 18, 1880.]

[No. 6191.]

LADD, RESPONDENT, vs. DURKIN, APPELLANT.

PRACTICE AND PLEADING—JUDGMENT—FINAL AND CONCLUSIVE in another action, as to same parties.

Appeal from the District Court of the Twenty-third Judicial District, San Francisco County.

J. C. Bates, for appellant.

P. B. Ludd, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The only question before us on this appeal is whether the plaintiff's testate paid and satisfied a certain judgment which the appellants obtained against him before they caused his property to be levied upon and sold on execution issued upon it. That question was determined before this action was commenced in an action in which said testate was plaintiff and the appellants defendants, in the Nineteenth District Court. The judgment rendered in that action must be held to be final and conclusive upon the points involved in it whenever they arise in another action between the same parties.

Order denying a new trial affirmed.

We concur: Myrick, J., Thornton, P. J.

Abstract of Recent Decisions.

SUPREME COURT OF THE UNITED STATES.

1. Attorneys employed by the purchaser of real estate to examine the title to the same, prior to the conveyance, impliedly contract with their employer to exercise reasonable care and skill in the performance of the undertaking.—*National Savings Bank of the District of Columbia* vs. *Ward*, October Term, 1879, No. 142.

2. Reasonable care and skill is also required by law of an attorney when employed to investigate the title to real estate with a view to ascertain whether it is a safe and sufficient security for a loan of money; and in either case, if the attorney is negligent or fails to exercise reasonable care and skill in the performance of the service, and loss ensues to his employer from such negligence or want of care and skill, he may be held liable to his employer for the consequences of such negligence.—*Id.*

3. When a person adopts the legal profession and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from the want of such care and skill, the attorney may be held to respond in damages to his client for the injuries sustained.—*Id.*

4. Proof employment and want of reasonable care and skill in the performance of the stipulated service are prerequisities to the maintenance of the action, and those matters must be alleged and proved.—*Id.*

5. Legal advice often becomes necessary in purchasing and conveying real estate, and it is well-settled law that an attorney may be held liable to his client for negligence or want of reasonable care and skill in making such an investigation, whether the client be the purchaser or grantor.—*Id.*

6. Where there is neither fraud, falsehood, nor collusion, the obligation of the attorney to exercise reasonable care and skill in the performance of the designated service is to the client and not to a third party, the rule being that the attorney, where no such wrongful elements exist, is not liable for the want of reasonable care and skill at the suit of any one between whom and himself the relation of attorney and client does not in some manner exist.—*Id.*

7. Cases where fraud and collusion are alleged and proved constitute a well-recognized exception to the general rule; but where the cause of action consists merely in the charge of the want of reasonable care and skill in the performance of a professional duty, the attorney is only liable to his client.—*Id.*

8. Actions for negligence, where the act of negligence imputed is one immediately dangerous to the lives of others,

stand upon a different footing; and the rule in such cases is that the wrong-doer may be liable to the injured party, whether there be any privity of contract between them or not.—*Id.*

9. Apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine and send it so labeled into the market, become liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label.—*Id.*

10. Surgeons who treat a patient unskillfully may be liable to the injured party as wrong-doers, even though it was the father or some friend or third person who contracted with the surgeon to perform the service.—*Id.*

11. Liabilities of the kind are not infrequent; but where the wrongful act is not of a dangerous character, and was not performed pursuant to a legal duty, the negligent party is in general liable only to the person with whom he contracted, and upon the ground that negligence is a breach of the contract.—*Id.*

12. Decided cases in great numbers fully sustain these several propositions.—*Id.*

13. None of those, however, give any support to such an action where it appears, as in this case, that the plaintiffs never employ the defendant to investigate the title or make the report, and that he never performed any such service at their request or in their behalf. Instead of that, he was employed by the claimant of the lot and was paid for his services by his employer.—*Id.*

14. Some evidence of usage was introduced, but the Court held that usage will not make a contract where none was made by the parties, and that the ruling of the court below in that regard is correct.—*Id.*

OREGON SUPREME COURT.

CONSTITUTIONAL LAW. The act entitled, "An act to provide for the construction of a road in Grant and Baker counties, to be known as the Eastern Oregon and Winnemucca Road, approved October 19, 1872," and "An act to provide for the construction of a wagon road up the south bank of the Columbia River from near the mouth of the Sandy, in Multnomah County, to The Dalles, in Wasco County, approved October 23, 1872," are not in conflict with Article IV, section 23, subdivision 7 of the Constitution, which declares that: "The Legislative Assembly shall not pass special or local laws in any of the following enumerated cases—that is to say, * * * * for laying, opening, and working on highways, and for election or appointment of supervisors."—*Allen* vs. *Hirsch*, February 16, 1880.

PUBLIC LAWS. The said Acts of the Legislative Assembly are public laws, and not special or local laws within the meaning of that clause in the Constitution.—*Id.*

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Current Topics.

THE Legislature has adjourned *sine die*. Many important bills amending, repealing, or adding new sections to the Codes were passed. When space permits we will notice the features of such of them as may demand it.

THE "general law" for the incorporation, etc., of cities and counties of one hundred thousand inhabitants, better known as the "McClure Charter," is in the hands of the Governor for his signature. It is so flagrantly violative of the Constitution that we think the chief executive *must* refuse to sign it.

THE "United Bar Association" has entered its protest against the "long" vacation proposed to be indulged in by the bench and the members of the "Bar Association." A glance at the minutes of the various courts will show that the gentlemen protesting have had their day in court, and an opportunity given them to dispose of many of the cases they now insist upon trying. The records will show that they fought as assiduously for a continuance as they do now for another "early opportunity" to try. This remark, of course, is limited by many exceptions; but while we are in no manner in favor of prolonged court vacations, we see no great injury that would result from giving every one a chance to be "ready" when their cases are called at the next term.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed March 18, 1880.]

[No. 6136.]

SHARP, RESPONDENT, vs. MILLER, APPELLANT.

PRACTICE AND PLEADING—SEVERAL CAUSES OF ACTION—WHAT CONSTITUTES BUT ONE. Where the *gravamen* of the complaint is, that the defendant maliciously procured an attachment against the plaintiff's property in an action in which the defendant was not a party of record, and in narrating what the defendant did in connection with the issuing and levying of the writ it is stated that he (the said defendant) had joined another in filing an undertaking, the action is not upon the undertaking, but for malicious prosecution of an attachment; and but one cause of action is stated.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco County.

P. B. Ladd, for appellant.
G. F. & W. H. Sharp, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The plaintiff, after alleging in his complaint that he was at all the times therein mentioned the owner of certain specified real estate in the city and county of San Francisco, proceeds to state that on the 13th day of June, 1874, the defendant did maliciously procure one Charles L. Morris, then a non-resident of this State, and for the immediate benefit and profit of the defendant, to institute and prosecute a certain action in one of the District Courts against the plaintiff for the recovery of $51,000 and upwards; that in said action defendant maliciously, and without probable cause, and for his own benefit, procured to be issued by the Clerk of said Court, in said action a writ of attachment, directed to the Sheriff; that on the same day the defendant and one Carlton W. Miller filed the requisite undertaking with the Clerk, the condition of which was, that if the plaintiff herein should recover judgment against said Morris in the action commenced by him as aforesaid, that defendant and his co-surety in said undertaking should pay to the plaintiff herein all costs and damages that he might sustain by reason of said attachment; that on the same day the defendant herein maliciously, and without probable cause, delivered said writ of

attachment to the Sheriff, and did then and there maliciously, etc., cause and direct said Sheriff to levy upon plaintiff's property; that a copy of the writ was duly recorded, etc., and continued a lien upon plaintiff's property until the 23d day of January, 1877, "when a judgment was affirmed in said action of Charles L. Morris against this plaintiff, in favor of this plaintiff for the sum of $300 costs and expenses, by the Supreme Court of this State;" that by reason of the issuing and levying of said attachment on plaintiff's property he was prevented from selling it, or any part of it, to his damage of $8,500, and was compelled to pay counsel, in order to get rid of said lien, $1,500. Wherefore he demanded judgment for $10,000 and costs of suit.

The complaint was demurred to on the grounds that it did not state facts sufficient to constitute a cause of action, and that the cause of action was barred by subdivision 1 of section 339, C. C. P. The demurrer was overruled, and the defendant answered. In his answer the defendant alleged, among other things, that the action was barred by the provision of the Code referred to in his demurrer. It was proved on the trial that a judgment, in the action of *Morris* vs. *Sharp*, was entered in favor of the plaintiff herein on the 13th day of August, 1875.

The Court, in its instructions to the jury, stated "that there were two causes of action set forth in the complaint—one in the form of malicious prosecution of an attachment, and the other on an attachment bond." The Court further instructed the jury as follows: "There is also a plea of the Statute of Limitations. It is contended that the attachment sued out in the Third District Court, which is the foundation of this action, was released on the 12th day of October, 1875, which is two years and eighteen days before this action was commenced. If you find that to be the case, then, so far as malicious prosecution is concerned, you will find for the defendant."

The plaintiff testified on the trial that the attachment was released and finally dissolved on the 12th day of October, 1875; and the defendant afterwards introduced and read as evidence an order of the Third District Court of that date, discharging the attachment in said action of *Morris* vs. *Sharp*. As there does not appear to be any conflict of evidence upon that question, it would seem that, under the charge of the Court, the jury should have found for the defendant upon that issue. We are not, however, prepared to adopt the views of the Court as to the number of causes of action united in the complaint. It is quite clear that

two causes of action are not separately stated in it, and equally clear, we think, that if there are two contained in it, no Court can determine where the statement of one ends, or the other begins. We are not called upon to affirm or deny that the complaint contains words which, if properly arranged, might state two causes of action. But it does seem to us that, as now arranged, they state what they were intended to state—one cause of action—and that is not upon the undertaking. The *gravamen* of the complaint is, that the defendant maliciously procured an attachment to be issued against, and levied upon, the plaintiff's property, in an action in which the defendant was not a party of record. In narrating what the defendant did in connection with the issuing and levying of the writ, it is stated, among the other steps which were necessarily taken before the writ could issue, that he and one Carlton W. Miller filed the undertaking required by law in such cases, and then proceeds to state that the writ was delivered by the defendant to the Sheriff, with directions, etc. It is in this connection alone that the undertaking is referred to in the complaint. Formerly it might have been sufficient to describe the tortious act or injury itself generally, without setting out the particulars of the defendant's misconduct. But it was always allowable to adopt the latter mode, and it is certainly permissible under the Code. The first impression of the Court was doubtless the same as ours is now. At the commencement of the instructions to the jury this passage occurs: "This is an action, as we supposed when we started out, for malicious prosecution of an attachment; but as we live we learn, and we afterwards discovered that there were two causes of action set forth in the complaint—one in the form of malicious prosecution of an attachment, and the other an action on an attachment bond."

We do not doubt that the first impressions of the Court were correct, and that the last was erroneous; from which it follows that the action was barred by the Statute of Limitations. And as the verdict under said instruction was in favor of the plaintiff, the defendant's motion for a new trial should have been granted, on the grounds that the Court erred in charging the jury that the complaint contained two causes of action, one of which was a cause of action upon the undertaking upon attachment; and that the evidence conclusively proved that the only cause of action stated in the complaint was barred by the Statute of Limitations.

Judgment and order denying a new trial reversed.

We concur: Thornton, P. J., Myrick, J.

DEPARTMENT NO. 2.

[Filed March 18, 1880.]

[No. 5985.]

HANSEN vs. MARTIN.

EVIDENCE—RELEVANCY OF—IF PREJUDICIAL, MUST BE STRICKEN OUT—IF NOT, NO GROUND FOR REVERSAL.

Appeal from the District Court of the Third Judicial District, San Francisco County.

Sol. A. Short and *W. H. Thompson*, for appellant.

Wise & Mhoon, for respondent.

MYRICK, J., delivered the opinion of the Court:

This was an action founded upon an alleged verbal contract relating to the purchase, for joint account, of stock of the Justice Mining Company and other companies. The case was tried by a jury. Plaintiff had judgment; defendant moved for a new trial, which was denied, and defendant appealed.

Three alleged errors are relied upon by appellant:

1. Plaintiff being examined on his own behalf was asked, "How much of the Knickerbocker stock did defendant buy under the your advice?" Defendant objected. The question was asked with the avowed object, not to claim anything for Knickerbocker stock, but to show the connection between the parties, and their relations and actions growing out of the contract alleged. The Court overruled the objection; no exception was taken. The answer, "he bought some, he told me so," could not have prejudiced the defendant; on the contrary, it might tend to show the relations of the parties—viz., that they were dealing in stocks—and it was therefore relevant.

2. Question addressed to plaintiff: "Did you obtain employment as purser on the steamship *Salvador* on the 22d day of August, 1874?" Defendant objected; the objection was overruled; no exception taken. The answer was given, which was a matter of inducement to the alleged contract. At a subsequent period in the trial, defendant moved to strike out the testimony, which motion was denied, and defendant excepted. Even if the testimony had been irrelevant and immaterial, its retention is not ground for granting a new trial unless it appear that the party was prejudiced by it. (*Tully* vs. *Harloe*, 35 Cal. 302.) But we are of opinion that the testimony was relevant for the purpose for which it was offered.

3. The third alleged error is as to a question put to the witness Barney on cross-examination. Defendant objected to the question; the objection was overruled, and defendant excepted. It does not appear from the transcript that the question was ever answered; neither does it appear but that the direct examination of the witness by the defendant laid a foundation for the question. No direct examination of the witness is in the transcript.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, P. J.

IN BANK.

[Filed March 22, 1880.]

[No. 6973.]

THE PEOPLE EX REL. J. F. COCHRAN, APPELLANT,

VS.

THE BOARD OF EDUCATION OF THE CITY OF OAKLAND ET AL., RESPONDENT.

CERTIORARI—WHEN WRIT WILL LIE. The writ will lie to review the action of an inferior tribunal, board, or officer exercising *judicial functions*.

IDEM CASE. The Board of Education of Oakland, in adopting a series of readers for the public schools of that city, and discarding the use of another series that had been in use in said schools, exercised a *legislative* and not a judicial function, and the writ will not lie to review the action of said Board.

Appeal from the Supreme Court, Alameda County.

Geo. L. Morgan and *John F. Swift*, for respondent.

A. L. Hart, Attorney-General, E. H. Rexford, and *A. A. Cohen*, for appellant.

THORNTON, J., delivered the opinion of the Court:

On the 17th day of January, 1880, the Board of Education of the city of Oakland approved the report of the committee appointed by it in favor of the adoption of the Appleton series of readers to be used in the public schools of that city. It appears from the petition of the relator that during the years 1873, 1874, and 1875, and ever since, the McGuffey's series of readers had been in use in the schools referred to.

On the 20th day of January, 1880, a writ of review on the petition aforesaid, issued from the Superior Court of the county of Alameda to the defendant Board, commanding it

to certify to that Court a copy of the order and resolution of the 17th of January, 1880, and all its records, files, and proceedings in reference to the subject matter of the order and resolution—to-wit, to the proposed change of readers—for review by that Court. On the return to the writ, the cause came on to be heard, and on the 3d of February the Court rendered a judgment dismissing the writ, and affirming the action of the Board. The cause comes before us on appeal from the judgment.

The view which we take of this cause renders it unnecessary to decide any other than the question, whether a writ of *certiorari* will lie to review the action of the Board of Education in relation to the change of books made by the resolution of the 17th of January.

This writ lies to review the action of an inferior tribunal, board, or officer exercising judicial functions, when such tribunal, board, or officer has exceeded its or his jurisdiction, and there is no appeal, nor, in the judgment of the Court, any plain, speedy, and adequate remedy. (C. C. P., section 1068.)

Did the defendant (Board of Education) exercise judicial functions in its action sought to be reviewed? Was not the action legislative in its character?

"The distinction between a judicial and legislative Act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Whenever an Act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such Act is to that extent a judicial one, and not the proper exercise of legislative functions." (Per Field, J., in the "Sinking Fund" cases, 99 U. S. Rep., S. C. 761.) The learned Judge then proceeds to illustrate the rule just laid down by stating two cases, one reported in 3 Scammon (Ills.) 238, and the other in 10 Yerger (Tenn.), *Jones* vs. *Perry*.

The rule so clearly laid down by the learned Justice we adopt as correct. Testing the proceeding before us by this rule, it is obvious that the defendant, in its action with regard to the books to be used in the public schools of the city of Oakland, was not exercising judicial functions. There was no party before it upon whose rights it was passing with reference to any transaction whatever. Neither the party having a right to control the sale of one series of readers or the other was before it, prosecuting any right given to it by any law in existence. If present at all, the party was there

as any other person had a right to be, urging the policy of adopting the one series of readers, and the impolicy of adopting the other. The Board acted upon the proposition before it as one of policy or expediency, aiming to adopt that which, in its judgment, would be best for the constituency which it represented. Its action was then political or legislative, and was in no proper sense judicial in its character. It is conceded that the Board exercised its judgment in the action which it took, but this it was called to do in the exercise of its legislative functions. It is apparent that the exercise of judgment is not the criterion by which this proceeding must be viewed to determine its character. To render it the exercise of a judicial function, its judgment must act in a matter which is judicial in the sense above indicated. (*People* vs. *Bush*, 40 Cal. 344; *S. V. W. W.* vs. *Bryant*, 52 Cal. 132; *The People* vs. *Mayor*, 2 Hill. 9; *In the matter of Mount Morris Square*, 2 Hill, 14; *In re Salinas County*, 45 Mo. 52; *People* vs. *Livingston*, 43 Barb. 232.

This writ does not lie under our laws to review the action of any tribunal, board, or officer in the exercise of functions which are legislative in their character. (See cases cited, *supra.*)

It follows from the foregoing that the judgment of the Court below affirming the action of the defendant Board must be reversed, and the cause remanded with directions to dismiss the proceeding.

We concur: McKinstry, J., Sharpstein, J., Ross, J.

DISSENTING OPINION.

I dissent. Where a duty is imposed by law on an inferior tribunal, board, or officer, in the performance of which it has no discretion, its action in the performance of that duty is ministerial; but where the law imposes a duty, in the performance of which the tribunal, board, or officer can exercise judgment and discretion, and its action results in depriving a taxpayer of any of his rights of person or property, such action is, in its nature, *quasi* judicial.

In the case in hand, the action of the Board of Education of the city of Oakland, of which the petitioner complains, is equivalent to the determination of a question of right and of property against him. Of right, because the petitioner, as a taxpayer of the city, is entitled to exercise the right of having his children educated at the public schools in the course of studies prescribed by the law; and of property, because if the action of the board in changing the series of text-books used in the schools is in excess of the powers of

the board, he will be deprived of his money to purchase books for the use of his children in the schools, which are wholly unauthorized; and no man can be deprived of his property except according to the law of the land.

In form the action of the board is not judicial; but as a determination of the rights of the petitioner, it is as effectual as if a judgment had been rendered against him.

From this alleged wrong against his person and property, the petitioner has no appeal or any other adequate remedy; and I think the proceedings of the board are subject to be reviewed by a writ of *certiorari*, which is issuable by a court in the exercise of its superintending power over inferior tribunals and officers exercising judicial functions.

Certiorari, as a remedy for such wrongs, has not heretofore been questioned. (See *People ex rel. Bellmer* vs. *Board of Education*, 49 Cal. 684.)—McKEE, J.

I concur in the dissenting opinion of Mr. Justice McKee. —MYRICK, J.

DEPARTMENT No. 2.

[Filed March 23, 1880.]

[No. 6837.]

CITY AND COUNTY OF SAN FRANCISCO, RESPONDENT, vs. RANDALL, APPELLANT.

BAIL BONDS—ACTION ON—DESCRIPTION OF PROPERTY EMBEZZLED—WHEN SUFFICIENT. Where the complaint alleges that Tyler was president and manager of a corporation, and as such manager had under his control securities of the value of $60,000, which were held by the corporation as a pledgee, the names of the owners of the securities being unknown, and that Tyler did willfully, unlawfully, and feloniously embezzle and convert the securities to his own use, contrary to the execution of his trust, it is a substantial compliance with section 1426 of the Penal Code.

MISNOMER. The addition of *Jr.* is no part of a name proper.

FORM OF BONDS—ENDORSEMENT OF AMOUNTS ON BOND—Discussed.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco County.

D. J. Murphy and *John P. Bell*, for respondent.

Tompkins & Mowry, for appellant.

MYRICK, J., delivered the opinion of the Court:

This is an action commenced by the city and county of San Francisco against Randall and McCann, to recover $29,000

on five bail bonds given for the release of one John Tyler from custody on five alleged criminal charges. In four instances the charge was embezzlement; in the other, conspiracy. The complaint counts upon each bond, viz.: 1. Embezzlement, $15,000; 2. Embezzlement, $5,000; 3. Conspircy, $5,000; 4. Embezzlement, $2,000; 5. Embezzlement, $2,000.

The said Tyler was arrested November 17, 1877, upon warrants issued from the Police Judge's Court of the city and county of San Francisco, and on the 23d day of the same month the Police Judge made orders that he be admitted to bail. December 11, 1877, the bonds were executed, and Tyler was released from custody. Subsequently the hearing upon the charges came on before said Police Court, and Tyler not appearing, the bonds were declared forfeited, and this action was commenced. Judgment was rendered against the defendants, Randal and McCann, for the amounts of the bonds and interest; their motion for a new trial was denied, and they appealed.

Thirty-eight points were made by defendants on their motion for a new trial. It is not necessary to consider them in order as made, as many of them can be considered together. We will consider the substance of them.

First. That the complaints as to embezzlement do not state facts sufficient to constitute a crime, in that the property charged to have been embezzled is not sufficiently described, and that it does not appear whether it is felony or misdemeanor attempted to be charged; that Tyler might have done all of the acts alleged, and not have been guilty of embezzlement.

Section 1426, Penal Code, requires that the complaint shall set forth "the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint."

The complaints allege that Tyler was president and manager of a corporation, and as such manager had under his control securities of the value of $60,000, which were held by the corporation as a pledgee, the names of the owners of the securities being unknown to the deponent; and that Tyler did willfully, unlawfully, and feloniously embezzle and convert the securities to his own use, contrary to the execution of his trust. We think here is a substantial compliance with section 1426. So in regard to the complaint alleging conspiracy.

Second. The allegations of the complaint are made against

John Tyler, whereas in the criminal charges and the warrants he was named John Tyler, Jr. The addition "Jr." is no part of a name proper. It nowhere appears that there were two persons named John Tyler, or that the party arrested was misled.

Third. That the bonds are not in compliance with the statute, in that they do not state that he is to appear before the Police Judge for examination.

Section 1278 of the Penal Code, gives a form for bail bonds, and says that the bond to be given shall be substantially in that form. That form applies to bonds to be given, as well where the party is to appear before the magistrate for examination as where he is held to answer after examination. The bonds in question follow the form given in the statute. They are that he will "appear and answer the charge above mentioned, in whatever court it may be prosecuted." If a party be arrested, and the examination postponed to a future day, before the same magistrate, that is a Court in which the charge is to be prosecuted. In the bonds in question the charge is stated, in four of them, to be "embezzlement," and in the other "conspiracy." This is a substantial compliance with the statute, "stating briefly the nature of the offense." It is not necessary that the bail bond shall state the offense with the same particularity as to detail that is required in an indictment.

There are words in the form of the bond given in section 1278, which have no application to bail given pending examination. These words are inserted in the bonds in suit, viz.: "And if convicted, will appear for judgment and render himself in execution thereof," etc.; but they do not vitiate the bonds; they may be treated as surplusage. In the Police Court, a party is not to be convicted of a felony, nor to appear for judgment, or render himself in execution; but he is to appear in response to the charge made against him; and there is sufficient in these bonds to cover that obligation.

Fourth. That there is variance between the allegations and proofs as to the amounts of the bonds to be given; no order to admit to bail being endorsed on one of the warrants, $10,000 endorsed on another, $2,000 on another, $5,000 on another. In each of the bonds there is a recital, "an order having been made on the 23d day of November, 1877, by David Louderback, Police Judge of the city and county of San Francisco, that John Tyler be held to bail." The defendants, in signing the bonds, admitted the amounts to have been fixed; it does not appear but that other orders were made fixing the amounts as stated in the bonds.

Fifth. That after the bonds were given, no order was made or signed by the Police Judge for the release of the prisoner.

Section 1281 of the Penal Code provides that "upon the allowance of bail and the execution of the undertaking the magistrate must, if the defendant is in custody, make and sign an order for his discharge," etc. The object of this provision is that when bail has been given, the object for which the bail was given shall be accomplished—viz., the release of the prisoner from custody. There are two main points to be looked at—viz., the giving of the bond, and the release which follows. The one precedes the other, and that other must follow the first. The machinery, the intermediate steps, are not essential to the validity of the bond. After the bond has been given, but one step further is necessary, and that is that the prisoner be released. In this case it appears that the Police Judge made an order, delivered orally from the bench, that the prisoner be released, bonds having been given; that order was certified in writing by the Clerk of the Police Court to the keeper of the prison, who thereupon delivered the prisoner and endorsed the discharge on the order. Thus the giving of the bonds produced the effect for which they were given. The prisoner was released from custody, he became the prisoner of his bail, who could at any time have had him arrested and surrendered, and who had undertaken and were answerable that he appear before the Court in response to the charges.

Sixth. That there was no evidence that Tyler was called in the Police Court for examination, or that he failed to appear, or that by reason thereof the bail became forfeited, or that an order of forfeiture was made or entered by said Court.

December 15, 1877, an order was made in each case, giving the title of the court and cause, as follows:

"This action came on regularly this day for examination, and the defendant, John Tyler, Jr., failing to appear for examination, and the said defendant having been thrice called, and R. S. Randall and Peter McCann, the bail of said defendant, having also been thrice called to produce the body of said defendant, and said defendant having failed to appear, and said bail having failed to produce the body of said defendant, the Court orders and declares the bail bond in this action for the appearance of the defendant forfeited to the people of the State of California, and orders a bench warrant to be issued for the arrest of the defendant."

This order is an answer to the objection.

Judgment and order affirmed.

We concur: Sharpstein, J.; Thornton, P. J.

DEPARTMENT No. 1.

[Filed March 29, 1880.]

[No. 5644.]

THEODORE LE ROY ET AL., RESPONDENT,

vs.

JOSEPH DUNKERLY ET AL., APPELLANT,

MILITARY RESERVATIONS—TIDE LANDS. From the date of the treaty between the United States and Mexico up to the admission of California into the Union, the United States held the legal title to all *tide lands*, in trust for the future State; and on the admission of California the legal title became vested in the State, unless it be shown that they had been reserved by Mexico as a tract set apart for military purposes.

IDEM. The establishment of a fort on the promontory of Point San Jose, a space of land and water arbitrarily fixed at a radius of 800 yards, with the extremity of the point as a center, furnishes no evidence of such a reservation.

EJECTMENT—SALE OF CITY'S INTEREST IN LANDS CONVEYED BY ACT OF MARCH, 1851. Where a plaintiff in ejectment claims lands conveyed to the city by the Act of March 26, 1851, by virtue of a deed from the Commissioners of the Funded Debt, and a deed from the Sheriff following a sale under an execution against the city of San Francisco, he is entitled to recover possession as against one not a creditor of the city.

Appeal from the District Court of the Fifteenth Judicial Court, San Francisco.

W. H. Patterson, for respondent.

B. S. Brooks, *H. H. Haight*, and *J. M. Kinley*, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

The action is ejectment to recover possession of a block of land situate within the limits of the tract granted by the State to the city of San Francisco for the term of ninety-nine years by the Act of March 26, 1851. (Laws 1851, p. 307.)

It is claimed by appellant that the lands in controversy never became the property of the State of California, from whom plaintiffs pretend to deraign title, but passed from the Mexican Government to that of the United States as part of a military reservation. The lands are covered by the waters of the Bay of San Francisco, and lie beyond the line of ordinary high tide. The bill of exceptions contains the following: "It was admitted by the plaintiffs that Point San Jose, or Black Point so called—the promontory—was occupied as a military post by the Mexican Government, and was so occupied at the time of the transfer of the fort to the Americans, and has continued to be so occupied down to the present time." It was shown at the trial that the demanded premises were within a circle of a radius of 800 yards, accepting the extremity of the promontory as the central point.

On the last day of the year 1851, the then President of the United States issued his proclamation, in part, as follows: "The reservation, including Fort Point, Point San Jose, and the Presidio, at the entrance of the harbor of San Francisco, made by order dated November 6, 1850, is hereby modified and reduced so as to embrace only the two following tracts of land, viz., the *promontory* of San Jose, within boundaries not less than 800 yards from its northern extremity, etc. It is beyond question that the lands in dispute herein are not within the limits named in the proclamation, since, by its terms, those limits include only dry land. The order of November, 1850, is not in the transcript, but there is no suggestion that the demanded premises are included within any boundaries defined in that order. From the date of the treaty of 1848 the portion of the *tide lands* in controversy was held by the United States in trust for the future State, and on the admission of California the legal title to said lands became vested in the State, *unless* it has been shown that they had been reserved by Mexico as part of a tract set aside for military purposes, and had passed to the United States— under our system especially especially charged with the defense of the harbor. (*Pollard's Lessee* vs. *Hagan*, 3 How. U. S. 220; *Webber* vs. *Harbor Commissioners*, 18 Wall. 65; *Tripp* vs. *Spring*, Pacific Coast L. J., vol. 2, p. 30.)

There is no evidence that any portion of the tide lands thereabout were ever expressly reserved by the Mexican Government, but it is said that inasmuch as it was proved that a fort was established on the *promontory*, a space of land and water, such as might have been swept by its guns—arbitrarily fixed at 800 yards with the extremity of the point as a center—was reserved from private ownership. Doubtless it is an usage of war to remove or prohibit the erection of any private building which may interfere with the command of the earth's surface for such distance around a military fortification as the commandant of the post or his engineers may deem requisite. In such case the military necessity is, for the time, the supreme law. But this of itself would not prevent the acquisition from the Government of property in the lands within range of the guns, which, like all other property held in private ownership, might be subject in certain exigencies to such injury as is incidental to the protection of the country against a public enemy.

We fail to find that the case of *Colin Mitchell* vs. *The United States*, 15 Peters, 52, conflicts with the views above expressed. That case merely interprets and renders more definite the decree directed by the Supreme Court of the United

States in *Mitchell* vs. *The United States*, reported in 9 Peters, p. 711. The causes had reference to the private land claim of Mitchell and others, which was based upon grants of the Creeks and Seminole Indians, ratified by the authorities of Spain before the cession of Florida to the United States.

The Court (9 Peters), in confirming the plaintiff's title, *excepted* from one of the tracts the fortress of St. Marks "and the territory immediately adjacent and appurtenant thereto." Reference was made to a provision of the Act of Congress under which the adjudication was made, which contained a clause applicable to any grant—"which was protected and secured by the treaty, and which *might have been perfected* into a complete title, under and in conformity to the laws, *usages, and customs* of the Government under which the same originated." This was held to be an express recognition of any known and established usage or custom in the Spanish provinces in relation to grants of land and the title thereto, which should bring them within a well-established rule of law. The cause was remanded with directions that the *lands ceded by the Indian proprietors* to the crown of Spain for the fortress be ascertained, and such lands be excepted from the tracts confirmed to the plaintiffs; further, if the boundaries of such cession could not be ascertained, then that the lands adjacent to the fort "which had been considered and held by the Spanish Government or the commandant of the post as annexed to the fortress," be still considered as annexed to it and held with it for the use of the United States; and if no evidence could be obtained to designate the extent of the adjacent lands which were considered as annexed to St. Marks as aforesaid, then so much land should be comprehended as according to the military usage "was generally attached to forts in Florida or the adjacent colonies." After filing the *mandate* of the Supreme Court of the United States in the Superior (Territorial) Court of Middle Florida, the plaintiffs filed a bill claiming from that Court a confirmation of the lands excepted up to the walls of the fort of St. Marks, and (by amendment) claiming the land covered by the fort itself. The Superior Court, however (after finding that there was no sufficient evidence designating the extent of the territory ceded by the Indians, or the adjacent lands considered by the Spanish Government or Commandant of the Post annexed to the fort), declared that there *was evidence* on which to determine the extent of lands adjacent to forts in Florida, which was usually attached to such forts, and that the extent of such reservations was determined "by a radius of 1500 Castilian *varas* from the salient angles of

the covered way all around the works," etc. The land within such a circle around the Fort St. Marks was excepted from the private claim confirmed. (15 Peters, 83.)

The case of the plaintiffs before us does not depend upon any grant made to them during the Spanish or Mexican sway. We are not inquiring whether the plaintiffs have derived from Mexico an imperfect right, which might, or might not, have become a complete title in accordance with the usages or customs of that country. The question here is whether, from the treaty up to the admission of California into the Union, the United States held the legal title to these particular lands (in common with all the other *tide lands*), in trust for the State Government which should be organized, or whether the United States Government held them in full ownership, freed of any trust in favor of the future State, and for its own exclusive use and benefit as a military reservation, and since continues to so hold them.

There is no evidence in the record that the demanded premises were included by any direct or express act within the boundaries of a military reservation, nor is there any evidence that a custom or usage ever existed in Mexico or California by which lands situate like the demanded premises were withheld from private grant, or reserved by the Government as annexed to a military post or appurtenant thereto. In the absence of such evidence (whatever might otherwise be said), it must be held that the lands in controversy attached to the State of California in full ownership on her admission into the Union "upon an equal footing with the thirteen original States."

The legal title of the city in the term mentioned in the Act of March 26, 1851, was conveyed to or vested in the Commissioners of the Funded Debt (subject to certain trusts in favor of the city and its creditors), by virtue of the deed of the Commissioners of the Sinking Fund, the Act of May 1, 1851, "to authorize the funding of the floating debt," etc., the acceptance by the city of the terms and conditions of that Act and the city's *consent* to the transfer to the Commissioners of the Funded Debt. (*Board of Education* vs. *Fowler*, 19 Cal. 22.)

In respect to the law of May 1, 1851, and the proceedings under it, the Supreme Court, in the case last cited, has said: "But as to the property which has been conveyed by the city to these Commissioners of the Sinking Fund, the Act of 1851 and the conveyance following it took effect. * * * We understand that the execution by the city of the bonds authorized by this Funding Act, in pursuance of and to give

effect to this Act, amounts to an acceptance by the corporation of the Act of the Legislature in all its parts; and this would be sufficient to give validity to the entire Act, if, by force of the legislative will alone, the Act, as a conveyance of the property of the city, would not be effectual. The purpose and effect of the Act in this aspect of it—that is, as a conveyance or authority for a conveyance of this city property—are clearly indicated upon the face of it. The express language of it is, that it is a conveyance to the Commissioners of this property upon express trusts, to be used only for such trusts, and the title to be returned to the city upon the fulfillment of the trusts. If the debts were paid by the city, or the creditors released their claims, the property would become again the property of the city in full ownership. The *legal title*, as in other cases of trust deeds for the security of debt, was in the grantee; the equity of redemption and residium after the satisfaction of the trust debts in the city. *The city could still sell or dispose of this residuary interest, could take care of and preserve the estate—perhaps could go into possession of it*, subject only to the superior right of the Commissioners, so long as the debts were unpaid."

On the 15th day of September, 1851, in the Superior Court of San Francisco, one Carr recovered a money judgment against the city, which on the same day was duly entered, docketed, and recorded. At the sale under execution duly issued upon such judgment, the plaintiffs purchased the premises herein demanded, and received the Sheriff's certificate and deed of the same.

As we have seen, before the date of that judgment, the *legal title* had been vested in the Commissioners of the Funded Debt.

There can be no manner of doubt that prior to the passage of the Act of May 1, 1851—if not prior to the assent of the city to the property being placed in the hands of the Commissioners of the Funded Debt—the interest of the city in the beach and water lots for the 99 years was absolute, qualified by no conditions. It was subject to levy and sale under execution; and had the levy under the execution, through which plaintiffs deraign, been made prior to May 1, 1851, plaintiffs would have acquired, by virtue of the Sheriff's deed, the legal title to the 99 years' term. (*Holladay* vs. *Frisbie*, 15 Cal. 635; *Wheeler* vs. *Miller*, 16 *Id.* 124.)

The purchase by the plaintiffs at the execution sale, and the Sheriff's deed to them, operated an assignment of the equitable estate remaining in the city after the legal title vested in the Commissioners of the Funded Debt. Section

217 of the Practice Act of 1851 read: "All property, real and personal, of the judgment debtor not exempt by law, shall be liable to execution." Nowhere in that Act are equitable estates or interests mentioned *eo nomine*. All property *remaining in a grantor* of the legal estate was liable to seizure under execution, as included in the general term "property." The city, as we have seen, retained a right in the residium after payment of its debts, etc.; an interest which amounted indeed to the exclusive use and enjoyment, subject only to the superior right of the Commissioners to sell and convey any portion of the lands while the debts remained unpaid. (*Board of Education* vs. *Fowler*, *supra*.) In this State all beneficial estates are liable to be taken in execution, irrespective of the question whether they are legal or equitable. (*Kennedy* vs. *Nunan*, 52 Cal. 331; Freeman on Executions, sec. 188.)

The plaintiffs having thus been substituted for the city with respect to its rights in the property, the transcript further shows that: "On the 25th day of July, 1869, the Commissioners of the Funded Debt executed and delivered to plaintiffs an instrument in form of a deed, purporting to convey the demanded premises."

On the 2d day of July, 1866, the Legislature had passed an Act which, after reciting that by the Act of May 1, 1851, certain real estate of the city had been conveyed by the Commissioners of the Sinking Fund to the Commissioners of the Funded Debt, and that it was alleged that certain lots of such real estate had not been leased, conveyed, or otherwise disposed of by the Commissioners last named, but were held adversely, authorized the Commissioners of the Funded Debt, "by and with the consent of the Board of Supervisors," to sell at public or private sale, and convey any lot or lots described in the conveyance from one of the said Boards of Commissioners to the other, to any person or persons claiming the same or claiming title thereto by purchase for a valuable consideration, or by devise or descent; provided no such sale should be made for less than fifteen per cent. of the assessed value of the property so sold or conveyed.

It may be assumed, for the purposes of this case, that the legal title to the *tide lands* might have been vested in the Commissioners of the Funded Debt in trust for the payment of the city's debts, without the city's consent. (*Grogan* vs. *San Francisco*, 18 Cal. 591.) The legislation of the State, however, has always left the control of these lands in the city. It will have been observed that in *Board of Education* vs. *Fowler* the Court laid stress upon the *acceptance* by the

city of the Act of 1851 with all its terms and conditions. We need not inquire whether it would now be held that the acceptance of the Act by the city—or its consent to the transfer of the legal title to the Commissioners of the Funded Debt—could be shown otherwise than by resolution of the Board of Supervisors. Such consent was contemplated—or at least was possible—and was given under the Act of 1851, as that Act was construed in *Board of Education* vs. *Fowler*. There can be no doubt that the Legislature could continue in the city the power to contract with respect to the property, and make the disposition of it depend upon the assent or dissent of the municipality.

The Act of April 2, 1866, in terms made the *consent* of the city necessary to a sale by the Commissioners. The Board of Supervisors constitute the local legislature, and (as the city and county, or its agents), in the absence of specific provisions or limitations to the contrary, have the management of the property of the city and county, the successor of the city of San Francisco. Where the property is held as private property, or where, as in the present case, the disposition of it depends upon the *consent* of the city and county, such consent must be expressed by the Supervisors. There can be no reasonable doubt that the *consent* required by the Act of April 2, 1866, is the consent of the municipality, which, so long as the city and county retained an interest in the property, could be given only through the Board of Supervisors.

That the consent of the city was required to the new trusts impressed upon the legal title of the Commissioners' Funded Debt, again indicates that the Legislature had intended to leave to the local government the control of the property, except so far as the previous Act of May 1, 1851, had deprived it of such control.

It was urged by appellants that by the Act of April 2, 1866, the Commissioners of the Funded Debt had no *power* to make the deed of July 25, 1869, without the consent of Board of Supervisors first obtained; and that there is neither evidence *aliunde* of such consent, nor—as must be assumed, since the deed is not set out at length in the bill of exceptions—any recital to that effect in the conveyance itself. But, as a consequence of what has been said above, and as the rights of the parties affected were fixed and established by the Act of May 1, 1851, and the consent of the city thereto, the legal title was in the Commissioners of the Funded Debt, as trustees of an express trust, and the city was *cestui que trust*, it would seem that the rights of each should be tested

by reference to the principles which would govern in case of the creation of similar trusts by private contract. Tested by that standard, even if the deed from the Commissioners to to the plaintiffs of July 25, 1869, was unauthorized by the trusts as originally defined in the Act of May, 1851, or as modified by that of April 2, 1866, it operated to transfer to the grantees the *legal estate*, and in ejectment the legal title must prevail. (Hill on Trustees, side pp. 175, 188.) The city or the assignees of its equity might continue to treat the Commissioners as trustees, or might follow the legal title into the hands of the grantee of the Commissioners; but the defendants—mere intruders—could not assert the breach of trust as a defense to the action at law for the recovery of the possession. (Perry on Trusts, sec. 274.)

It is unnecessary to uphold the conclusion last reached by asserting that in consequence of *any inherent quality* in the municipality, as such, it controls the disposition of property like that in controversy, so that such property may not be disposed of by the paramount political authority without the consent of the municipality. It has been enough to ascertain that the power of assent or dissent to its disposition has been placed or left by the Legislature in the city and city and county.

But even if it could be held under different circumstances that defendants might object to the failure to prove the consent of the city to the conveyance of July 25, 1869, the plaintiffs here are as well the assignees of the city as grantees of the Commissioners. The right to consent to the conveyance, as every other right of the city in the premises, had passed to the plaintiffs by virtue of the execution sale and Sheriff's deed; and no stronger evidence of plaintiff's consent to the conveyance could be required than that they took it and claim under it.

The record does not disclose a reconveyance by the Commissioners of the Funded Debt to the city and county, or that the debts of the city have all been paid by the Commissioners, nor does the assent of the creditors of the city appear to be a divergence from the original purpose of the trust, as defined by the Act of 1851. A creditor not yet paid may assert a right to have the land in controversy (if there be not sufficient remaining in the Commissioners) subjected to sale, and the proceeds applied to the satisfaction of his claim. His claim, however, is but an equity which may bind the legal title of the plaintiffs, but which cannot affect the right to the possession until asserted. The defendants are not creditors, or in any way connected with the creditors, of the

city, for whose benefit the disposition of the lands was placed in the hands of the Commissioners.

The evidence required of the Court below to grant a new trial. Order affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed March 22, 1880.]

[No. 6178.]

WALKER, APPELLANT, vs. FELT, RESPONDENT.

DISMISSAL OF ACTION BY PLAINTIFF OF RECORD. Neither the plaintiff of record nor his attorney can dismiss the action after having transferred all their interest in the subject matter of the action, to the injury of their successors in interest, notwithstanding the action was being conducted without a change of the title of the cause, or of the attorney of record.

Appeal from the District Court of the Twenty-third Judicial District, San Francisco County.

McAllister & Bergin, for appellant.

D. W. Douthitt, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

In 1871 the plaintiff and his attorney united in a conveyance of all the property involved in this action, as appears from deeds recorded at that time. Since that time their successors in interest, through their attorneys, have taken charge of the plaintiff's side of the case, without a change of the title of the cause or of the attorney of record. It was known, however, by the defendant's attorneys, for some years prior to 1877, as appears from the affidavit of one of them, that other attorneys than the attorney of record were representing other parties than the plaintiff of record in the prosecution of the action. In 1877 the plaintiff of record and his attorney signed a stipulation, which was also signed by an attorney of some of the defendants, dismissing the action without costs to either party; and upon that stipulation being presented to the Court by the attorneys of some of the defendants, an order dismissing the action was entered. As soon as the successors in interest of the plaintiff and their attorneys were informed of that order, they moved to vacate and set it aside. The motion was denied, and from the order denying that motion this appeal is taken. The plaintiff has never been a resident of this State, and his attorney left this State ten or twelve years before signing the stipulation above referred to, and has not since returned.

Had the plaintiff in the action the right to dismiss it after having transferred his interest in the subject matter of the action to other parties? Section 385 of the Code of Civil Procedure provides that, in case of any transfer of interest, the action may be continued in the name of the original party, or the Court may allow the person to whom the transfer is made to be substituted in the action. Under that section it was the right of the successors in interest in this case to prosecute this action in one of these forms. The party who had transferred his interest divested himself of any power to control the action. He could not dismiss it, because his successors had a right to have it continued. The validity of the order of dismissal in this case rests solely upon the consent of the original plaintiff, given ten years after he had transferred his interest in the action. As he had no right to interfere with the action, the Court, on being advised of that, should have vacated the order based upon it.

The attorney who signed the stipulation as the attorney for the plaintiff did not assume to act as the attorney of his successors in interest. In his affidavit he says that he himself was the real plaintiff in interest at the time of the commencement of the action, and until he united with the nominal plaintiff in conveying the property involved in the action as before stated, and that he signed the stipulation because he and the nominal plaintiff had parted with all interest in the land, and did not wish to prosecute the action any further, and did not desire to become liable for costs.

We cannot discover that this gave him any right to stipulate away the rights of his successors in interest. The attempt to do so should be defeated if the Court possesses the requisite power to defeat it. The act involves a flagrant breach of good faith. And that is a thing which justice abhors. Nor is the act of signing that stipulation palliated in the least by the shameless confession of the attorney who signed it that he had no title to the land he sued for, and subsequently conveyed. The Court which made the order dismissing the action must have been imposed upon; and after discovering the fraud and imposition, the order should have been promptly vacated.

Order denying the motion to vacate and set aside the order dismissing the action reversed, with directions to the Superior Court of San Francisco to vacate and set aside said order dismissing said action, and the judgment entered upon said order of dismissal.

We concur: Myrick, J., Thornton, P. J.

DEPARTMENT NO. 2.

[Filed March 23, 1880.]

[No. 5877.]

CONNIFF, RESPONDENT, vs. KAHN, APPELLANT.

PRACTICE AND PLEADINGS. A demurrer overruled by consent of counsel in the Court below will not be considered on appeal.

STREET ASSESSMENTS—FRAUD PER SE—WHAT DOES NOT CONSTITUTE. The assignment of a public contract to a party who was performing the work under a private contract at the date of the public contract is not fraud *per se*.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

C. H. Parker, for respondent.
M. A. Edmonds, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal from a judgment in an action upon a street assessment. The complaint was demurred to on the grounds—first, that it did not state facts sufficient to constitute a cause of action; and second, that it was ambiguous, unintelligible, and uncertain. The order overruling the demurrer is as follows: "On motion of plaintiff's attorneys, *defendant's attorney consenting thereto*, ordered that the demurrer to the complaint herein be and the same is hereby overruled, with leave to the defendant to answer in ten days." In his points and authorities, the counsel for appellant insists that the demurrer should have been sustained. If he had not consented to its being overruled, it would be the duty of this Court to consider that point. As it is, we cannot regard it as before us on this appeal.

That the work was more than half done under a private contract, to which defendant was not a party, before any steps were taken to let a public contract, and that the plaintiff went on and completed the work, and after its completion the party who had taken the public contract assigned it to plaintiff, does not constitute fraud *per se;* and as the Court has found that there was no fraud, we cannot reverse the judgment on that ground.

Judgment affirmed.

I concur: Myrick, J.

I do not think the complaint was demurrable, and concur in the judgment.—THORNTON, J.

DEPARTMENT NO. 2.

[Filed March 24, 1880.]

[No. 6468.]

FISCHBECK, RESPONDENT.
vs.
PHENIX INSURANCE CO., APPELLANT.

INSURANCE—OTHER INSURANCE—AUTHORITY OF AGENT TO BIND COMPANY. Where the agent of an insurance company has full knowledge of the existence of prior insurance, and issues a policy for further insurance, the policy is not void, notwithstanding it contains a clause to the effect that "if any other insurance has been made upon the said property without the consent of the company, the policy is null and void."

IDEM—EVIDENCE. Conversations between the insured and the insurance broker through whom the business was negotiated (who was dead at the date of the trial), relating to the obtaining of the policies and to his (the insured) statements to the broker of the former insurance, is competent as parts of the *res gestæ*.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco.

H. F. Crane, for respondent.

Winans & Belknap, for appellant.

MYRICK, J., delivered the opinion of the Court:

This is an action on a policy of insurance issued by de-defendant to insure a stock of goods of plaintiff. The defense was that other insurance existed not noted on the policy, and of which defendant had no information. Plaintiff had judgment; defendant moved for a new trial, which was denied, and defendant appealed.

One Taylor, an insurance solicitor, solicited defendant to take insurance on his stock of goods. Plaintiff already had insurance to the amount of $12,500—namely, $5,000 in the Fireman's Fund, $5,000 in the Hamburg-Bremen, and $2,500 in the People's. Taylor was informed of this insurance. Taylor went to R. B. Swain, agent of defendant and of the Manhattan Insurance Company, and obtained a policy of $2,500 from each of the last mentioned companies. No endorsement of the prior insurance was noted on the policies issued by Swain. The two policies were issued, and Swain received the premiums at the agreed rates. Plaintiff and Swain did not meet in the transaction; the business was negotiated through Taylor, who received his compensation from Swain by a percentage on the premium paid. The policies were dated January 18, 1870.

The fire by which the goods were injured occurred Sep-

tember 26th–7th, 1870. On the next day plaintiff went to Swain and the agents of the other companies, and informed them of the loss. They all went to the place of the fire and talked of the affair. Swain said to plaintiff, "that the loss could not amount to much; there are four of us; that it will be divided among four companies; that the loss would not be very heavy, as there were four companies to share." He also said: "The companies will appoint an adjuster, and you will have to get one on your side." Mr. Garniss was selected as adjuster, and on the 28th of September, 1870, made an adjustment, fixing the total loss at $7,687.48, and naming the insurance thus: "$5,000 in the Fireman's Fund of San Francisco; $5,000 in Hamburg-Bremen of Hamburg; $2,500 in Phenix of Brooklyn, N. Y,; $2,500 in Manhattan of New York city. Apportionment: Fireman's Fund insures one-third, and pays $2,562.48; Hamburg-Bremen insures one-third, and pays $2,562.48; Phenix insures one-sixth, and pays $1,281.26; Manhattan insures one-sixth, and pays $1,281.26. Total, $7,687.48." (The policy of the People's Insurance Company had expired.) The policy in question contained a provision for appointment of appraisers to value the property in case of difference, but their award "shall not determine any question as to the *liability* of this company under this policy."

In making his proof of loss to the companies, plaintiff's declaration, dated September 27, 1870, contained a statement of the various amounts of insurance as above stated, with the names of the companies. The proofs and appraisement were given to Mr. Swain. After some four or five days, the Fireman's Fund and Hamburg-Bremen companies paid their *pro rata*. The same day plaintiff went to Mr. Swain, who asked for a little time—a few weeks—and said, "I will pay in a few weeks." Soon after, plaintiff went again, and Swain tendered to him the unearned part of the premium, retaining the earned part, and at his request plaintiff signed the following, endorsed on the policy:

"October 12, 1870—Canceled by the return of $19.83, unearned premium."

Some six weeks after the loss, plaintiff went again to Swain for the amount of the loss due from his companies, and Swain then, for the first time, made the objection that the amount of the other insurance had not been noted on his policies, and said that his companies would not permit him to pay. Thereupon this suit was brought to have the policy reformed by endorsing thereon the amounts of the former insurance, and to recover from defendant its proportion of the loss.

Neither Taylor nor Swain were examined as witnesses, both having died. On the trial plaintiff was permitted, against defendant's objection, to testify to conversations had by him with Taylor relating to the obtaining of the policies, and to his statements to Taylor of the former insurance. This testimony was competent, not only because the conversations were parts of the *res gestæ*, but because there is other evidence in the case from which it might properly be inferred that Taylor had given to Swain the information derived through those conversations; otherwise how could Swain have known, as soon as the fire occurred, that there was other insurance? It is stated in one part of the testimony that Swain said: "I know of your other insurance, but my company will not let me pay, as it was not endorsed." In another part it may be inferred that he said: "I *knew* of the other insurance." This testimony was competent as tending to show that Swain knew, before the issuance of the policies, of the former issuance.

The policy sued upon contains the provision "that if any other insurance has been, or shall hereafter be, made upon the said property, and not consented to by this company, * * this policy shall be null and void." Notwithstanding similar provisions, it has been repeatedly held by courts in nearly all of the States, that where there is former insurance which is not noted on the policy in question, if the agent knew of such former insurance, and the policy be issued, such knowledge of the agent is knowledge of the company, and the policy is valid. In this case, there was some evidence tending to show such knowledge on the part of Swain; the Court below found that defendant had full notice of the other insurance; therefore this Court will not disturb the judgment for that reason.

Again, when the adjustment was being made, Swain had full knowledge of the other insurance, and of the proportion of the loss which fell to his companies. It is true that by the terms of the policy the fact of appraisement—*i. e.*, fixing a value in dollars and cents—did not determine any question as to the liability of the defendant. But other things were done besides fixing a value; there was an acceptance of the apportionment, and a tacit, if not actual, acquiescence in it; there was payment by the other companies of their proportion, and a promise by Swain of payment of the proportion of his companies. He thus practically misled plaintiff into releasing the other companies from liability for the entire loss (if Swain's policies had not been valid), and into accepting their proportions only. When the agents all met on the

morning after the fire, if Swain's attention had been then for the first time called to the fact of other insurance, it was his duty, in good faith to the defendant, to have at once taken his objection, or at least have done no act to lead plaintiff into relying upon the supposed liability of the defendant.

Again, Swain retained the earned premium on the policy—that is, the portion of the premium paid corresponding with the period from the issuance of the policy to the loss. Thus he kept plaintiff's money for the insurance, and then refused to pay for the loss. This does not appear to be good faith. If he had been deceived, it was his duty, as soon as the deception was ascertained, to return the whole premium.

Judgment and order affirmed.

We concur: Thornton, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed March 18, 1880.]

[No. 6381.]

DONNELLY vs. CURRAN.

EVIDENCE—IRRELEVANT TESTIMONY CANNOT BE REBUTTED BY OTHER IRRELEVANT TESTIMONY. The offering of improper evidence by one of the litigant parties never can justify the introduction of similar evidence by the other party.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Wm. Mathews, for appellant.

M. Mullaney, for respondent.

ROSS, J., delivered the opinion of the Court:

This is an action for the recovery of a certain roan horse which was stolen from the plaintiffs.

The defendant claimed to have purchased the horse here in controversy from one Charles Jones, and denied that the horse so purchased by him was the plaintiff's horse. At the trial the defendant gave some testimony, without objection on the part of plaintiffs, to the effect that Charles Jones was a man of good character. The plaintiffs in rebuttal offered "the record with a plea of 'guilty' to an indictment of Charles Jones, *alias* George Jones, in the Municipal Criminal Court of San Francisco, for stealing a horse from one Wm. McMaster on the 9th of June, 1876, and which record also shows that he had been previously convicted of petit and grand larceny. I offer it (said plaintiffs' counsel) for the purpose of contradicting Mr. Curran's statement that this was a man of good character." The offer was objected

to by counsel for defendant on the ground, among others, that the character of Charles Jones was not in issue in the case, and that the offered evidence was irrelevant. The Court ruled as follows: "The record is admitted in evidence for the purpose of rebutting the good character of Charles Jones, leaving the jury to determine the identity of the individual."

To this ruling the defendant excepted, and assigns it as error entitling him to a new trial.

That the character of Jones was not in issue in this case does not admit of question. The only question is, whether the giving of irrelevant testimony upon that subject by the defendant entitled the plaintiffs to go into evidence to reply to it. The affirmative of this proposition was held in *Grafton Bank* vs. *Woodward*, 5 N. H. Rep. 301, and in *Furbush* vs. *Goodweed*, 5 Foster, N. H. 449; but in the note to section 469, *a*, 1 Greenleaf on Evidence, it is said the rule is, in general, the other way. And we agree with the Court in *Walkup* vs. *Pratt*, 5 H. & J. 56, where they say: "The offering improper evidence by one of the litigant parties never can justify the introduction of similar evidence by the other party; such doctrine would lead tc endless confusion, and destroy all the established rules of evidence." (See also *Mitchell* vs. *Sellman*, 5 Md. 385.)

Because of the error committed in the particular mentioned, the judgment and order must be reversed, and the cause remanded for a new trial. So ordered.

We concur: Morrison, C. J., McKee, J.

DEPARTMENT NO. 2.

[Filed March 23, 1880.]

[No. 6306.]

HAFFENEGGER, APPELLANT, vs. BRUCE, RESPONDENT.

PRACTICE—FINDINGS. The Court must make and sign findings of fact when requested, unless waived.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

M. G. Cobb and *Wm. Crosby*, for appellant.

M. A. Wheaton, for respondent.

By the Court:

The bill of exceptions in this case shows that upon the rendition of the judgment in favor of the defendant the plaintiff requested the Court to make and sign findings of fact, which the Court failed to do, and that findings of fact never have been made or waived, which is made a ground of exception by the plaintiff. For this error the judgment must be reversed.

Judgment reversed.

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Current Topics.

JUDGE FREELON, one of the Superior Judges for this city and county, affirmed the judgment of the Police Court in the matter of the appeal of Kearney. The defendant applied to the Supreme Court for a writ of *habeas corpus*, and the application was granted and made returnable before the *Superior* Court, of which Judge FREELON was a member. That Court has refused to entertain the motion, because it had previously disposed of the whole subject through one of its members; that the judgment of one of its members is the judgment of the whole Court. This reasoning seems justified by the provisions of the instrument creating the Court; but we confess our inability to see just why the Supreme Court refused to consider the application itself, and order it returnable before the Superior Court. The bar is interested in seeing this question of practice settled.

FORTY PAGES of opinions by our Supreme Court appear in this issue of the JOURNAL. There is no method of securing and keeping for future reference *all* the opinions of our Supreme Court, that is *sure* and *convenient*, than a subscription to, and preservation of, all the copies of the JOURNAL.

Supreme Court of California.

IN BANK.

[Filed March 22, 1880.]

[No. 10,427.]

THE PEOPLE, RESPONDENT, vs. AH CHUNG, APPELLANT.

CRIMINAL LAW—INDICTMENT—MOTION TO SET ASIDE. Where the Court below finds, upon a motion to set aside the indictment because not found and presented as provided by the Penal Code, that the indictment was properly found, endorsed, and presented, and that the evidence does not justify an exception based upon the grounds specified by section 995 of the Penal Code, the judgment of the lower Court will not be reversed, if the findings of the Court are sustained by the evidence of numerous witnesses, though the evidence on the points of objection is conflicting.

IDEM—ORDER FOR JURY. An order for a jury may be made after the commencement of the term.

IDEM—CHALLENGE TO JUROR. Where a juror stated that he would not convict in a capital case on circumstantial evidence, a peremptory challenge to such juror by the State was properly sustained.

INSTRUCTIONS. If the instruction asked is substantially covered by the charge of the Court to the jury, it is not error to refuse it; it is not the duty of the Court to state the law to the jury more than once.

Appeal from the District Court of the First Judicial District, Santa Barbara County.

Attorney-General Hart, for respondent.

Richards & Boyce, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

The defendant and appellant was tried and convicted of the crime of murder in the first degree, the jury fixing the punishment at imprisonment in the State Prison for life. On this appeal several grounds of error are assigned, upon which we are asked to reverse the judgment of the Court below.

First. The first error assigned is the refusal of the Court to set aside the indictment. The defendant being brought up for arraignment, moved the Court to set aside the indictment for the following reasons:

1. That said indictment was not found, endorsed, and presented as prescribed by the Penal Code of the State of California.

2. That one Ching Yug, a Chinaman, and one Bough, a Chinaman, and another Chinaman to this defendant unknown, were examined as witnesses before the grand jury which found said indictment against this defendant; and the names of said witnesses are not inserted at the foot of said indictment, nor endorsed thereon; nor is the name of

either of said witnesses inserted at the foot of said indictment, or endorsed thereon.

3. That certain persons were permitted to be present during the session of the grand jury, and certain persons were permitted to be present before said grand jury when the charge embraced and described in said indictment was under consideration—to-wit, Ching Yug, a Chinaman, Bough, a Chinaman, and another Chinaman whose name is unknown to this defendant; and said persons were not, nor was either of them, the Judge of the Court giving advice to the grand jury, nor the District Attorney of said Santa Barbara County, nor a member of the grand jury, nor a witness under examination.

Section 995 of the Penal Code provides that an indictment must be set aside by the Court in which the defendant is arraigned in the cases above specified; and the only inquiry therefore is, were the grounds or specifications, or either of them, sustained by the evidence? The matter involved in the foregoing objections was fully examined by the District Court, and after hearing the evidence of the District Attorney and fourteen of the grand jurors, defendant's motion to set aside the indictment was denied; the order denying said motion reciting that "the Court being fully advised in the premises, finds that said indictment was found, endorsed, and presented as prescribed by the Penal Code; that the names of the witnesses examined before the grand jury were properly inserted at the foot of the indictment; that no persons were permitted to be present during the examination of the charge or the finding of the indictment, except such as might lawfully be present."

We have carefully examined the evidence on the points made, and find the same very conflicting. It is sufficient to say here that the findings of the Court are fully sustained by the evidence of numerous witnesses, and possibly by a preponderance of evidence taken on the hearing of the motion. There was therefore no error in denying defendant's motion to set aside the indictment.

Second. The next error is predicated upon the following order of the District Court: "No term jury having heretofore been drawn and summoned at the present term of the Court, and it now appearing that such a jury will be required, it is now hereby ordered that the names of thirty-six persons be forthwith drawn from the jury box, and that the jurors so drawn be summoned to appear at this court-room on Monday, April 28, 1879, at 10 o'clock A. M., to serve as trial jurors." In pursuance of the above order, the County Clerk and

Sheriff, after due notice, proceeded to draw from the jury box the names of thirty-six jurors to serve as trial jurors for the March term of said District Court, and the names of said trial jurors were duly returned by the County Judge, Sheriff, and County Clerk to said County Court. Of the thirty-six persons so drawn from the jury box, thirty-three were duly summoned .by the Sheriff, and answered to their names, whereupon the defendant interposed a challenge to the panel on the following grounds:

1. That there was no order for said jury made and filed with the Clerk of the county of Santa Barbara before the commencement of the March term of said District Court.

2. That the Clerk of said Court did not notify the County Judge of Santa Barbara County of the time appointed for said alleged drawing, and that the County Judge did not attend at the County Clerk's office to witness such drawing, and said drawing was not adjourned until the next day, as required by law.

3. The drawing of said jurors was not conducted by the Clerk of said Santa Barbara County, and no minute was kept by any one of said attending officers. That the names of the following persons were drawn at said drawing, and that each of said persons had permanently removed from said Santa Barbara County—to-wit, George Ben, J. C. Edwards, and Le Flint; and that there was no entry of such fact made in the minutes of said drawing, and no additional names were drawn in their place, and the whole number of jurors ordered by the Court—to-wit, thirty-six—were not drawn, nor have they appeared, and that the minutes of the drawing were not signed by the Clerk of said county, or the attending officers or persons. The said challenge having been argued and submitted, was overruled by the Court, and defendant duly excepted.

The objection that no order was made for the jury before the commencement of the term is not well taken. Section 226 of the Code of Civil Procedure makes provision for such a case: "Whenever jurors are not drawn and summoned to attend any court of record, or a sufficient number of jurors fail to appear, such court may, in its discretion, order a sufficient number to be forthwith drawn and summoned to attend the court."

The next objection, "that the Clerk did not notify the County Judge of the drawing, nor did he attend," is not sustained by the transcript, as it appears from the transcript that the County Judge was present when the names of the jurors were drawn.

The third objection, that three of the jurors had perma-

nently removed from the county, is immaterial. Indeed, there is no evidence of that fact, except the return of the Sheriff that they could not be found in his county; and it is not pretended that the officers who drew the names of these jurors from the box had knowledge of their removal—if, in fact, they had previously removed from the county.

Third. The third exception found in the transcript is taken to the ruling of the Court sustaining the peremptory challenge of the District Attorney to the juror Brown. The juror was interrogated as follows:

Q. Have you any such opinion or conscientious scruple as would preclude you from finding the defendant guilty in a case where the death penalty might be inflicted?

A. I should not hang a man unless the proof was very positive, and it was a grave case.

Q. As I understand you, you would not have the death penalty inflicted in a case of circumstantial evidence?

A. I would not.

Q. (By the Court.) Did I understand that you did entertain conscientious scruples in regard to the infliction of the death penalty?

A. My answer was that I would not hang a man unless the proof was positive, and it was a very grave case.

Q. That is to say, you would require direct evidence of the commission of the offense to convict the defendant, even if the testimony fairly showed by circumstances that you would be precluded from finding a verdict of guilty where the penalty might be death?

A. Yes, sir.

It clearly appears from the examination of the juror that he would not convict, in a capital case, on circumstantial evidence, and we think that the challenge was properly sustained. There are many cases in which the evidence on the part of the prosecution is entirely circumstantial, and to hold that a party is a competent juror who will not convict on such evidence would in many cases defeat the ends of justice.

Fourth. The fourth assignment of error found in the transcript is based upon the refusal of the Court below to give the following instruction, asked for by the defendant:

"When independent facts and circumstances are relied upon to identify the accused as the person who committed the crime charged, and taken together are regarded as a sufficient basis for a presumption of his guilt to a moral certainty, or beyond a reasonable doubt, each material independent fact or circumstance necessary to complete such chain, or series of independent facts tending to establish a pre-

sumption of guilt, should be established to the same degree of certainty as the main fact which these independent circumstances, taken together, tend to establish. That is to say, each essential independent fact in the chain or series of facts relied upon to establish the main fact must be established to a moral certainty beyond a reasonable doubt, and to the entire satisfaction of the jury, or they must acquit."

It was held by this Court, in the case of *People* vs. *Phipps*, 39 Cal. 326, that the above instruction is a correct statement of the law, as the same is applicable to circumstantial evidence in criminal cases; and it was therefore error in the Court to refuse it, unless it was substantially given in the charge, or in some other instruction.

In the case of *People* vs. *Murray*, 41 Cal. 66, it was held that as defendant's first instruction was substantially given in the charge of the Court, its refusal was not erroneous; and in the late case of *People* vs. *Varnum*, 53 Cal. 630, the Court says: "The instructions which the Court refused to give at the request of the defendant were fully covered by the charge of the Court, so far as they correctly stated the law applicable to the case;" and the judgment was affirmed.

It only remains, therefore, in this connection for us to determine whether the instruction which the Court refused to give was substantially covered by the charge of the Court, or by another instruction which was given to the jury. It was upon this ground that the Court put its refusal to give instruction number ten.

It may be remarked here that, as a general rule, it is not the duty of the *nisi prius* Court to state the law to the jury more than once; neither is it the duty of such Court to make the closing argument in behalf of the defendant in a criminal case by giving a multiplicity of instructions, slightly varied in phraseology, but amounting to the same thing in substance. It is the duty of the Court to deal fairly with the defendant, and to that end it should state the principles of law applicable to the case clearly, distinctly, and intelligibly; and when that has been done the Court has fully discharged its duty.

The charge of the Court in this case was full, clear, and correct; and, independent of that, numerous instructions were given at the instance and request of defendant, one of which, the fifth, is in the following language: "Each circumstance essential to the conclusion of the defendant's guilt should be fully established in the same manner and to the same extent as if the whole issue rested upon it. You must be satisfied that each link in the chain of circumstances essential to that

conclusion sought to be established by the prosecution has been fully proved beyond a reasonable doubt, and to your entire satisfaction; otherwise you must acquit."

This was a clear and intelligible statement of the rule, and, taken in connection with other instructions given, fully and fairly presented to the jury the law of the case by which they were to be governed.

Judgment and order affirmed.

We concur: Myrick, J., Ross, J., McKee, J., Sharpstein, J., Thornton, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed March 26, 1880.]

[No. 5909.]

SCOTT, RESPONDENT, vs. DYER ET AL., APPELLANTS.

ALCALDE GRANTS—VALIDITY OF GRANTS MADE AFTER THE CONQUEST. A grant of lands by an Alcalde of the pueblo of San Francisco on the 23d day of September, 1848, and made in the usual form of such grants, and in compliance with the then customary formalities, is valid.

ALEXANDER vs. ROULET (13 Wall. 386) construed.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

Sidney V. Smith & Son, for respondent.

J. M. Wood, W. C. Burnett, and *John L. Murphy*, for appellants.

MCKINSTRY, J., delivered the opinion of the Court:

The plaintiff claims title to the lands described in the complaint under a grant of the same made by T. M. Leavenworth, Alcalde of the pueblo of San Francisco, to one A. C. Harris, on the 23d day of September, 1848, which was in the usual form of Alcalde grants, and made in compliance with the then customary formalities.

The question of the validity of such a grant, and that it conferred the right to the possession upon the grantee, cannot be reconsidered by this Court.

The 7th day of July, 1846, has been recognized by the Courts and by the Congress of the United States as the date when the authority of the Mexican Departmental officials terminated in California. But in *Cohas* vs. *Raisin*, 3 Cal. 443, it was held that a grant of a town lot made by an "American Alcalde," in 1847, conveyed a title to the grantee; and the Supreme Court said: "A grant of a lot in San Francisco,

made by an Alcalde, whether a Mexican or of any other nation, raises the presumption that the Alcalde was a properly qualified officer, that he had authority to make the grant, and that the land was within the boundaries of the pueblo." It was further said that such grants were not of any portion of the public domain, made by officers of the conquering power, but were "grants of municipal lands, made by the regularly authorized municipal authorities, under the laws, usages, and customs of the country, which were not interfered with by the military or *de facto* government," etc. It is indeed true that the particular grant there present was a grant made before the treaty of peace; but there is nothing in the reasoning of the Court in *Cohas* vs. *Raisin* which would suggest that a different rule could be applied to a grant made after the actual overthrow of the Mexican authority, whether made before or after the treaty was signed and ratified. The Court, in their opinion, said: "The fact that this right (of granting lots) was exercised by the municipality, in its different forms, *from* 1835 *to* 1850, without question or restriction, would prove the usage and custom in the absence of the law." If it should be admitted, as suggested—and we do not find it necessary to admit it—that the decision in *Cohas* vs. *Raisin* could be justified only by reason of the disturbed condition of land titles and threatened breaches of the peace, that very fact should induce us, after this lapse of time, to stand by the judicial solution of the question involved as *res adjudicata*.

The grant considered in *Dewey* vs. *Lambier*, 7 Cal. 347, was made by the officer who executed that under which the present plaintiff deraigns title, and was issued nearly two months *later*. In *Dewey* vs. *Lambier* the Court said: "In the examination of this case we have observed the same line of defense, substantially, as that made in the case of *Cohas* vs. *Raisin*, and, lest it might be supposed that there is some disposition on the part of this Court to question that decision, we take this occasion to approbate the same, and to announce our determination of adhering to it."

Passing *Hart* vs. *Burnett*, and *Payne* vs. *Treadwell*, 15 and 16 Cal., which recognize the cases previously referred to as authoritative, *White* vs. *Moses*, 21 Cal. 34, is directly in point. There the grant had been made in 1849. The case was decided in 1862, long after the Van Ness Ordinance had been ratified, and the Court declared: "The law upon this point, whatever may be the opinions of individuals or determinations of tribunals not governed by our judgments, must be considered settled, so far as it depends upon

the decisions of this Court, and cited *Cohas* vs. *Raisin*, *Dewey* vs. *Lambier*, *Welch* vs. *Sullivan*, 8 Cal. 179, and *Payne* vs. *Dewey*, 16 Cal. 232. As late as 1871 it was said, in *Broad* vs. *Broad*, 40 Cal. 496: "That an Alcalde's grant passed a title to a grantee therein named, is beyond controversy in this Court."

Nor (if it could be so overthrown) was the authority of the cases above cited overthrown by the Supreme Court of the United States in *Alexander* vs. *Roulet*, 13 Wall. 386. The grant there held to be invalid was a parcel of the common lands of the *pueblo*, and was made by Horace Hawes, *elected* and acting as *Prefect of a district* which included the pueblo within its boundaries. The judgment of the Circuit Court of the United States for the District of California, which was affirmed by the Supreme Court, was to the effect that, although each *Prefect* of California, while the same was part of the Mexican territory, had power to make grants of the common and unappropriated lands of the *pueblos* within their jurisdiction, yet that from and after the conquest and acquisition of the country by the United States they ceased to have such power, and consequently the grant of the Prefect Hawes was void.

The officers of the Territory of California (including Prefects), empowered by Mexican law to make grants of public lands, could grant lands within the pueblo; but the powers of such officers to make grants anywhere ceased upon the conquest, and the power was not transferred to the military officers or officers *de facto*, who immediately succeeded such departmental or territorial officers.

As we have seen, however, it has been determined by this Court that a grant by an Alcalde was not an ordinary grant of the public domain, but a grant of *municipal* lands made by a regularly authorized municipal officer under the laws, usages, and customs of the country not interfered with by the United States, or the *de facto* government which existed in California subsequent to the conquest and prior to the admission of the State into the Union. To maintain this position, it is not necessary to hold that the title or estate of the municipality was in any wise different from such as it was said to be in *Hart* vs. *Burnett*, *supra*.

Counsel for appellants seems to have misapprehended the effect of their citations from "Dwinelle's Colonial History of San Francisco." Governor Gutierrez, as there quoted, says: "The *Ayuntamiento* (or Alcalde, see *Hart* vs. *Burnett*) may dispose of these lands (the *ejidos*) for building lots. * * The *ejidos* could be alienated only for the purpose of granting

solares, or building lots," etc. (Dwinelle, p. 11.) The question, however, is not involved in the present case, for two reasons: First, it does not appear that the lot described in the complaint constituted a portion of the *ejidos;* second, it is not a question which can be considered here, in view of the *agreed case* or *stipulation* in the transcript.

The plaintiff being the absolute owner of the lands described in the complaint, they cannot be entered upon without her consent; nor can any portion of them be appropriated to the use of the public as a street, except upon due compensation paid or secured, and in pursuance of the proceedings prosecuted for that purpose.

Judgment and order affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed March 23, 1880.]

[No. 6852.]

ESTRADA, APPELLANT, vs. ORENA, RESPONDENT.

PRACTICE—PLACE OF TRIAL, CHANGE OF—DEMAND MUST BE IN WRITING—NOTICE OF MOTION NOT A DEMAND. A demand that the trial be had in the proper county must be made in writing. The notice of motion to change place of trial is not a demand.

Appeal from the District Court of the First Judicial District, San Luis Obispo County.

W. J. & Wm. Graves and *Ernest Graves*, for appellant.

Albert Packard, for respondent.

By the Court:

This is an appeal from an order changing the place of trial from the District Court of San Luis Obispo County to the District Court of Santa Barbara County.

On the 16th of July, 1879, defendant filed his answer; also an affidavit of merits for change of place of trial. On the same day he gave to the attorneys for plaintiff notice of motion for the first Monday of September, 1879, to change the place of trial, upon the ground that San Luis Obispo County was not the proper county for the trial of the cause. He made no demand in writing that the trial be had in the proper county. Such demand in writing must be made. Notice of the motion is not such a demand as is required by section 396, C. C. P.

Order reversed.

DEPARTMENT No. 1.

[Filed March 29, 1880.]

[No. 6354.]

WILLIAMS, RESPONDENT,

vs.

THE HARTFORD FIRE INSURANCE CO., APPELLANT.

INSURANCE—CONSTRUCTION OF POLICY. A clause in an insurance policy in these words, "Damage to property not totally destroyed, unless the amount of damage is agreed upon between the assured and the company, shall be appraised by disinterested persons mutually agreed upon by the parties," if not void for uncertainty, is inapplicable where there arises a dispute as to whether there has been a *total* or *partial* loss.

IDEM. Inapplicability of other clauses mentioned.

IDEM—PROOF OF LOSS may be waived, and if the jury finds there has been a waiver, though the evidence is conflicting, the judgment will not be disturbed.

IDEM—EVIDENCE. Where evidence is admissible for one purpose, but is incompetent for another, it is the duty of the objecting party to ask the Court to limit the evidence to the purpose for which it is competent; and if he fails to do so, he cannot afterwards complain. Unless requested to do so, the Court is not bound to give any instructions to the jury.

IDEM—TOTAL LOSS. A total loss does not mean an absolute extinction. So that a charge to the jury that "if you find that the building has lost its identity and specific character as a building, although a large portion of the walls was left standing, you may find that the property was totally destroyed within the meaning of the policy," is not erroneous.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

G. W. Gordon, for respondent.

Gray & Haven, for appellant.

ROSS, J., delivered the opinion of the Court:

This is an action upon a policy of fire insurance upon the plaintiff's undivided half interest in a brick building situated in Virginia City, Nevada. The plaintiffs recovered a verdict for four thousand five hundred dollars. Defendant moved for a new trial, which was denied, and brings this appeal from the judgment and the order refusing a new trial.

The policy contained, among other clauses, the following: "Damage to property not totally destroyed, unless the amount of said damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons mutually agreed upon by the parties; when personal property is damaged, the assured shall put it in best order possible, and make an inventory therof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised, and the detailed report of the appraisers in writing, under oath, shall form a

part of the proofs hereby required, each party paying one-half the expenses of the appraisals; and until such proof and certificates are produced, and examination and appraisal permitted, the loss shall not be payable. And the company reserves the right to take any part or all of the property appraised, paying market value therefor, in case the damage as appraised is deemed excessive."

The main contest between the parties at the trial in the Court below was whether a *total* or only a *partial* destruction of the building had resulted from the fire—the defendant contending that the destruction had been partial only, and further contending that under the clause of the policy just quoted no right of action existed in plaintiffs, as they had refused to join in an appraisal of damage, which defendant claimed to be a condition precedent to suit. We will consider this point first.

It is very doubtful whether the clause in question is sufficiently definite to be of any validity. It provides that when the property there referred to is not totally destroyed, the damage, if not agreed upon between the assured and the company, shall be appraised, a report of the appraisement made in writing under oath, etc., and that until the report is produced the loss shall not be payable. But how is the appraisement to be made? "By disinterested and competent persons mutually agreed upon by the parties." No number of appraisers is fixed, no mode of selection provided. Either party might withhold his or its assent to the appraiser or appraisers suggested by the other, or the company might suggest one number of appraisers and the assured another number. In either case, and in others that might be supposed, no appraisement could be made by "persons mutually agreed upon by the parties."

Again, take the very case now here, where the principal dispute is whether a total or only a partial destruction of the building resulted from the fire. If, as is claimed by plaintiffs, there was a total destruction, then clearly there would be nothing to arbitrate; for the clause under consideration only purports to provide for the appraisement of the damages to property "not totally destroyed." On the other hand, the company says there was but a *partial* destruction. This radical difference between the parties as to the main fact would, of course, render an arbitration impossible. The provision of necessity presupposes a concession by both parties that the property is *not* totally destroyed. It is obvious, therefore, that if the clause in question is not void for uncertainty, it has no application in a case like the present.

Otherwise, before the assured could come into court at all he would be forced to concede the very point in dispute—namely, that the property was not totally destroyed. But for another reason we think the clause has no application to this case. It provides, as has been observed, that the detailed report of the appraisers shall form a part of the proof required, and that until such proofs and certificates are produced, and examination and appraisal permitted, the loss shall not be payable. The "detailed report of the appraisers" here spoken of manifestly relates to the personal property the assured is required to put in "the best possible order," and of which he is to "make an inventory, naming the quantity and cost of each article, and upon each article," upon which it is provided "the damage shall be separately appraised." That this is the true construction is made clear by the concluding sentence of the clause, which is in these words: "And the company reserves the right to take any part or all of the *property appraised*, paying market value therefor; in case the damage as appraised is deemed excessive." This portion of the clause in terms relates to *all* property for which appraisement is provided. If real property is included within it, let us see what absurd consequences would follow. A building is insured, as was the case at bar. The building is erected upon land, and is a part of the realty. A portion of the building is burned—it is "not totally destroyed." The damage is appraised, but "the damage as appraised is deemed excessive." In such case, "the company reserves the right to take any part or all of the property appraised, paying market value therefor." But, since it was the building alone that was insured, it could only be the damage to the building that could be appraised, and that would be the property the company reserved the right to take at its market value. But the building pertains to the land—it is a part of the realty. The company didn't insure the land, and couldn't have it appraised, and couldn't take it at its market or other value. How could it take the building? This, of course, leads to an absurdity; but it is the logical result of the construction contended for by the appellant, and it goes to show that it was never intended or contemplated by the parties to the contract that the clause under consideration should relate to any other than personal property.

The policy further provided that in case of loss the insured should render to the company a verified statement, showing "the whole value and ownership of the property, and the amount of loss or damage;" and further that "in no case shall the claim be for a greater sum than the actual damage

to or cash value of the property at the time of the fire." It was contended by the defendant that this condition of the policy requiring proofs of loss was not complied with, and hence that the action could not be maintained.

The fire occurred October 26, 1875, and on the 6th of November plaintiffs furnished defendant with a verified statement of the loss, claiming a total destruction of the building, and to be entitled to the full amount of the insurance—$5,000—and setting forth the matters by the policy required to be stated. The statement was accompanied by a "Builder's estimate of damaged building owned by Williams, Bixler, and Douglass," which contained a general description of the building, and an estimate of the material, labor, etc., amounting in the aggregate to $11,214. This estimate was signed by Winchell, architect, and Thexton, builder, and was verified by them as follows: "We, J. K. Winchell and J. M. Thexton, having made and signed the foregoing estimate, do, each of us and each for himself, solemnly swear that we are not interested, either directly or indirectly, in the property to which the within estimate relates, or related to the owner thereof; that said estimate is a true, conscientious, and impartial exhibit of quantities and prices as therein described, based upon the cash value of materials and labor at the date of said fire, according to the best of our knowledge, skill, and judgment. And we verily believe that the actual cash value of the within described building was not less than eleven thousand two hundred and fourteen dollars, exclusive of the land upon which it was situated at the time of its damage or destruction."

The objection made by the defendant at the trial to the proof of loss, so far as it bears upon the point now under consideration, was that "the said statement of loss was an estimate for an entire new building, including new walls entire and new iron works throughout, and no allowance or deduction was made for the brick in the standing walls, or for the iron doors and window shutters." Defendant's counsel are mistaken in supposing that the estimate was for "an entire new building." It was an estimate of the value of the entire *old* building; for the architect and builder say in their affidavit that they "verily believe that the actual cash value of the within described building (the building mentioned in the estimate) *was* not less than eleven thousand two hundred and fourteen dollars, exclusive of the land upon which *it* was situated at the time of *its damage or destruction.*"

But even if the proofs, when furnished, were insufficient, such fact would be immaterial as the case comes before us.

For there was testimony given on behalf of plaintiffs tending to show a waiver in this regard on the part of defendant; and although the testimony upon this point was somewhat conflicting, the jury, under proper instructions, found for plaintiffs, and we will not disturb the verdict on that ground.

In "May on Insurance," section 468, it is said: "But the incompleteness and even non-production of all preliminary proof may be waived, and will be excused on the ground of waiver by the insurers if their conduct is such as to render the production or correction useless or unavailing, or as to induce in the mind of the insured a belief that no proofs will be required, or that those already furnished, though in fact defective, are satisfactory, and therefore sufficient. If the insurers intend to insist upon defects in the preliminary proof, they should indicate their intention in such a way that the insurer may not be deceived into a false security, and at such time that he shall have opportunity to supply the defects. If they wish further information, they should point out in what respect, or they will be presumed to be content with what has been furnished."

Another point made by the counsel is that the Court "erred in submitting to the jury, as evidence of amount of loss," the preliminary proofs above alluded to. It does not appear from the record that the Court did submit such proofs to the jury as evidence of the amount of loss. They were admitted in evidence, it is true. But the policy required such proofs to be made to the company, and one of the issues made by the pleadings in this case was as to whether the proofs had been in fact made. It was therefore necessary for plaintiffs, in order to maintain the action, to prove that they had made them, or else to show a waiver; and the best evidence of the proofs was the proofs themselves. They were clearly admissible for the purpose of showing a compliance by the assured with the conditions of the policy in that respect, and it is equally clear that they were not competent evidence of the amount of loss.

But it is the established rule in this State that when testimony offered is admissible for one purpose, but is incompetent for another, it is the duty of the objecting party to ask an instruction limiting the evidence to the purpose for which it is competent; and if he fails to do so he cannot afterwards complain. (*People* vs. *Collins*, 48 Cal. 277; *People* vs. *Estrada*, 49 Cal. 171.) No such instruction was asked by defendant in the present case. Unless requested to do so, the Court is not bound to give any instructions to the jury. (*Carter* vs. *Bennett*, 4 Fla. 283; *Avarett* vs. *Brady*, 20 Ga. 253; *Wood* vs.

Figard, 28 Penn. St. 403; *Ward* vs. *Howard*, 4 Jones, 23; *Briggs* vs. *Byod*, 12 Ired. 377; *Jones* vs. *State*, 20 Ohio, 34; *Taft* vs. *Wildman*, 15 Ohio, 123.)

Upon the question of the extent of the loss, the plaintiff Williams testified as follows: "The building was entirely burned out. It had every appearance of being a fire of great heat. Portions of the old wall were standing—that is, in position; they were all cracked and warped wherever joists had been in; they were badly torn out, apparently from the falling of the joists. It was so perfect a destruction that I, as well as the architect who examined it with me, placed it as a total destruction—that it was perfectly worthless as a building. In my own mind I deemed the building worthless. That which was left standing would just amount to debris. It was a wall which was unfit for use with any safety. I thought we would have to tear it down to make a new wall. It would have to be torn down and replaced—that is, another wall built in its place. I have been an extensive builder. * * * * The shutters were warped and blistered and injured to such an extent that I considered them perfectly worthless for any purpose, even as old iron, unless you might get some of the bands on the wrought iron portion. The balance of the iron work—the pillars, for example—were all warped so much that, while you might use them, you could not use them to make a perfect wall as it was before; hence I class that simply as old iron." The witness further testified that after the fire he sold his interest in the ground upon which the building had been erected to one Douglas, and told him, so far as the old debris was concerned, he could take it; that he did not care anything about it. There was some testimony given conflicting with that of Williams already stated, and some given in support of it. The evidence was also conflicting upon the question of the value of the property destroyed. There was no conflict, however, in the evidence as to the fact that after Douglas purchased he rebuilt, and in doing so used some of the remnants of the old building. At the request of defendant, the Court below submitted to the jury the following special issue: "Was the building insured by the defendant totally destroyed?" to which they answered in the affirmative. This finding will conclude the defendant, unless the jury was erroneously instructed upon the question. The charge of the Court was lengthy, but the gist of it upon this proposition is embodied in the following extract: "A total loss does not mean an absolute extinction. The question is whether all the parts and materials composing the building are absolutely or physically destroyed, but whether, after the fire,

the thing insured still exists as a building. Although you may find the fact that after the fire a large portion of the four walls was left standing, and some of the iron work still attached thereto, still if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy."

We think there was no error in the instruction. In *Nave* vs. *Home Mutual Insurance Company*, 37 Mo. 430, it was held that a policy of insurance upon a building is an insurance upon the *building as such*, and not upon the material of which it is composed. (See also *Huck* vs. *Globe Insurance Company*, Mass., reported in the Insurance Law Journal, December, 1879, p. 912.)

In *Insurance Company* vs. *Fogarty*, 19 Wall. 644, which was an action on a policy of *marine* insurance, the Supreme Court of the United States held that the doctrine of an absolute extinction of the thing insured is not the true doctrine, even in that class of cases, where the rule is stricter than in cases like the present. In the course of the opinion, in speaking of the case of *Hugg* vs. *The Augusta Insurance Company*, 7 Howard, 595, where there was an insurance of jerked beef of 400 tons, part of which was thrown into the sea, and part of the remainder so seriously damaged that the authorities of the city of Nassau refused to allow more than 150 tons of it to be landed, the Court say: "It will be observed that in this case, as in the case of *Morcardier* vs. *Chesapeake Insurance Company*, 8 Cranch, 47, the destruction spoken of is destruction as to species, and not mere physical extinction. Indeed, philosophically speaking, there can be no such thing as absolute extinction. That of which the thing insured was composed must remain in its parts, though destroyed as to its specific identity. In the case of the jerked beef, for instance, it might remain as a viscid mass of putrid flesh, but it would no longer be either beef or jerked beef. * * * The case of *Judah* vs. *Randall*, 2 Caine's Cases, 324, where a carriage was insured, and all was lost but the wheels, is another illustration of the principle. A part of the carriage—namely, the wheels, a very important part—was saved; but the Court held that the thing insured—to-wit, the carriage—was lost; that it was a total loss. *Its specific character as a carriage was gone.*"

We discover no error in the record entitling defendant to a new trial.

Judgment and order affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed March 19, 1880.]

[No. 6098.]

WELLS, APPELLANT, vs. HARTER, RESPONDENT.

MORTGAGE—RENEWAL OF—STATUTE OF LIMITATIONS. The renewal of a note secured by mortgage, by an endorsement upon it in writing, after the Statute of Limitations had run against it, does not operate to renew the mortgage. In order to create, renew, or extend the mortgage, there must be executed, in the mode prescribed, a written instrument, showing that such was the intent of the party to be charged.

IDEM—HOMESTEAD. Nor will a homestead, though filed after such renewal, on the property mortgaged to secure said note, be affected thereby.

VENDOR'S LIEN—WAIVED BY TAKING MORTGAGE. Nor could a vendor's lien be enforced against said property, the plaintiff having waived such lien by taking the mortgage.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco County.

E. A. Lawrence, for appellant.

A. W. Thompson, for respondent.

Ross, J., delivered the opinion of the Court:

On the 10th of May, 1869, plaintiff sold and conveyed to the defendant, Bloomfield Harter, certain real property. A part of the purchase money was paid in cash, and for the balance Harter executed to plaintiff his promissory note, dated May 10, 1869, and payable May 10, 1870, with interest thereon at the rate of one and one-half per cent. per month, and to secure the payment of the note executed to plaintiff a mortgage on the premises. From the time of the purchase, Harter and his wife, who is also a defendant in this action, have resided upon the property. On the 10th of February, 1875, plaintiff and Harter executed the following endorsement in writing upon the note: "In consideration of one dollar, it is hereby mutually agreed that the within note shall be extended to February 10, 1876, at one per cent. per month from this date. Petaluma, February 10, 1875." On the 8th of November, 1875, Harter and wife filed a homestead on the premises.

This action was commenced February 28, 1877, to recover the amount due from Harter, and to foreclose the mortgage.

Harter and wife answered separately, the wife setting up her rights under the homestead, and pleading the Statute of Limitations. The District Court gave plaintiff judgment against Harter for the amount of money due on the note, but refused to enforce the mortgage, and entered judgment in favor of Mrs. Harter.

The plaintiff moved for a new trial, which was denied; and the appeal is taken from the judgment and from the order refusing a new trial.

The only question in the case is whether the renewal of the note by Harter, made as it was before the filing of the homestead, but after the Statute of Limitations had run against the note and mortgage, operated to renew the mortgage also; or, to speak more accurately, whether the making of the new contract of February 10, 1875, to pay the note, also operated to create a mortgage on the property to secure its payment.

However it may have been prior to the adoption of the Codes, we think, in view of their provisions, that the agreement in question could not have that effect. By section 2911 of the Civil Code it is provided as follows:

"A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation."

The principal obligation in the present case was, of course, the promissory note; and the time within which, under the provisions of the Code of Civil Procedure, an action could and should have been brought on that note, expired on the 10th of May, 1874. The note and mortgage then became barred by the Statute of Limitations, and the lien of the mortgage thereupon became extinguished. (Section 2911, *supra*. See also the authorities cited under this section in the annotated Code.)

The agreement made between the payor and payee of the note, and endorsed on it in writing on the 10th of February, 1875, was the creation of a new contract, the consideration for it being, as was said in *McCormick* vs. *Brown*, 36 Cal. 184, "the original contract, on the moral obligation arising thereupon, binding *in foro conscientiæ*, notwithstanding the law of the statute." (See also *Chabot* vs. *Tucker*, 39 Cal. 438; section 360, Code of Civil Procedure.) It is this new contract that gives the plaintiff the right to recover the amount of the note. But the creation of the new contract to pay the money did not create a new mortgage to secure its payment. That could only be done in the mode prescribed by section 2922 of the Civil Code, which is as follows:

"A mortgage can be created, renewed, or extended only by writing executed with the formalities required in the case of a grant of real property."

It is plain that the agreement endorsed on the note does not answer the requirement of this statute. It makes no reference in terms to the old or to a new mortgage, and its lan-

guage does not admit of an inference even that the purpose of the parties was to create a new mortgage, or to renew or extend the old one. It is obvious that, in view of this provision of the statute, in order to create, renew, or extend a mortgage, there must be executed, in the mode prescribed, a written instrument, showing either by express terms or by fair intendment that such was the intent of the party to be charged.

As to the suggestion that if the mortgage be held to be barred the Court should enforce a vendor's lien, it is sufficient to say—first, that the action is not brought to enforce such lien; and secondly, that plaintiff waived his vendor's lien by taking the mortgage. (*Baum* vs. *Grigsby*, 21 Cal. 175; *Camden* vs. *Vail*, 23 Cal. 633.)

It follows that the judgment and order must be affirmed, and it is so ordered.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 2.

[Filed Marched 31, 1880.]

[No. 6058.]

ESTATE OF BROOKS.

PRACTICE—IRREGULARITY IN PROCEEDINGS. Questions relating to the sufficiency of the pleadings should be passed upon by the Court when presented. A reservation until other evidence is introduced is an "irregularity," but it does not necessarily prevent a fair trial.

WILL—UNDUE INFLUENCE—MENTAL CONDITION—EVIDENCE. The opinions of persons acquainted with the business and social habits of the testator as to his mental condition is admissible.

IDEM. It is not error to sustain an objection to the introduction of a will for the purpose of showing that it was not declared by the testator to be his last will.

IDEM—UNDUE INFLUENCE—FRAUD. Directions by the testator, subsequent to the execution of a will, to the devisee to pay certain persons certain sums of money, which the devisee has failed to do, while they may create a trust that might be enforced, they do not affect the validity of the will.

Appeal from the Probate Court of the city and county of San Francisco.

Sawyer & Ball, *A. H. Townsend*, and *J. M. Kinley*, for appellant.

Daniel Rogers, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal from the judgment and order of the Probate Court of the city and county of San Francisco, refusing to set aside the will of the decedent after it had been admitted

to probate. The case comes here upon the judgment roll, including a bill of exceptions. There was a section or paragraph in the petition of the contestant, which read as follows: "That deceased was not free from fraud at the time of the execution of said instrument. For that it was the will and desire of the deceased that his estate should be distributed after his decease differently than as named in said instrument, and that in executing said instrument he made and declared, as a part thereof, certain verbal bequests or legacies in favor of petitioner and divers other persons (and conferring benefits not conferred by said instrument), and charging the same on said Reid as executor; but, at said Reid's request, omitted to note them on said instrument, because of the promises of said Reid to pay them, which promises were made without any intention of performing them on the part of said Reid." This was demurred to on the grounds, as stated in the demurrer, that it did not "state facts sufficient to constitute a cause of action, *apportion*, or contest."

We confess our inability to discover the appositeness of all of these alleged grounds of demurrer. The demurrer was sustained by the Court on the ground "that the matter" contained in said paragraph "did not constitute a reason for revoking the will." There was no error in that ruling, as we will endeaver to show in another part of this opinion.

The bill of exceptions contains an amended petition of the contestant, which the proponent objected to on the "ground that it was immaterial, and because the allegations of one of the paragraphs were substantially the same as those contained in the paragraph of the petition to which the Court had sustained a demurrer." To this objection it is stated that "the Court reserved its decision, stating that in case the will was set aside, and declared null and void, it would allow said amended petition; but in case it was sustained, it would disallow said amended petition. The Court finally disallowed said amended petition, to which ruling the contestant duly excepted."

It strikes us that this constituted an "irregularity in the proceedings of the Court;" but we are unable to perceive that the appellant was thereby "prevented from having a fair trial." The practice of reserving a decision upon a question of this character until the evidence is in, is not, in our opinion, commendable. All questions relating to the sufficiency of the pleadings should be passed upon when presented, and before proceeding further in the trial. The orderly conduct of a trial requires this. But, as we understand it, the Court treated this amended petition as properly filed and before it,

until all the testimony had been taken, and then rejected it because it was not sustained by the evidence. If this be so, the appellant had the full benefit of his amended petition. And that he did, the testimony taken on the trial and copied into the transcript abundantly proves. He was permitted to introduce—without limitation, so far as we can discover—evidence in support of each and every allegation of his amended petition.

A witness testified to some remarks made by the proponent as to the condition of the testator only a few days before the execution of the will, without objection. After the witness had testified to all that proponent had said upon that subject, the Court said: "That is not evidence. Declarations of Reid (proponent) before the date of the will, unless they are a part of the *res gestæ* to show undue influence, are not evidence in this case, whether they come in directly or indirectly." Whereupon one of the counsel for contestant said, "We except to that." And there the matter ended. Neither side moved to have the evidence stricken out, and it comes here with the other evidence in the transcript, and, for anything that appears to the contrary, may have been considered by the Court with the other evidence in deciding the case. It was objectionable on the ground of being hearsay evidence; but whether it was excluded or not is more than we can determine from the bill of exceptions before us. A large number of persons who were more or less intimate with the deceased for many years before his death testified to their knowledge of his business and social habits, and expressed their opinions as to his mental condition. We think their evidence upon these points was properly admitted.

The testator and proponent, who is the principal devisee and legatee of the will, were partners for many years prior and up to the time of the decease of the former; and it is claimed on behalf of contestant that that *per se* raises a presumption of undue influence. We know of no case in which it has been so held. It is doubtless a circumstance to be considered with other facts and circumstances when determining the question whether or not undue influence was brought to bear upon the testator. We think the suspicion of undue influence having been exerted would be much stronger in a case where a testator should give all his property to a stranger, than in one where he gives it all to one with whom he was intimately connected socially and in business for a great many years immediately preceding his death.

There was no error in sustaining an objection to the introduction of the will for the purpose of showing that it was not

declared by the testator to be his last will. The will would not show whether he did or did not so declare.

The point, however, upon which the contestant evidently relies most is, that soon after the execution of the will the testator told proponent—to whom the testator had, as before stated, given nearly all of his property—that he (the testator) would some day tell him (proponent) what he wished to have him do with some of his property; and that the testator just before he died did give proponent directions to pay to certain persons and charitable institutions certain sums, and to pay to the contestant herein seventy-five dollars per month during his life, which directions were written down by proponent, and the memorandum of them was produced and read in evidence by him on the hearing of this matter. That is a question which has often been before the courts; and while they have held that in a proper case they would compel a devisee to carry out such directions, we are unable to find any case in which it was held that the fact of such directions being given and assented to was evidence that the execution of the will was procured by fraud or undue influence. If the directions on the one side, and the express or implied agreement on the other to carry them out, created a secret trust which can be enforced, the beneficiaries are as favorably situated as they would be if those same directions had been inserted in the will. And the ground upon which such trusts are enforced is that if the devisee had not assented to the request of the testator he might have made another will by which his wishes would be carried out. "The question is," says the Court in *Barrow* vs. *Grenough*, 3 Ves. 151, "whether the confidence, that the defendant (the devisee) would perform the trust he undertook, did not prevent the testator from making a new will." The proof is, that the directions as to a different disposition from that made by the will of some portion of the property were given some time after the execution of the will. The agreement, therefore, to carry out said directions could not have influenced the testator in making the will which he did make, but might have prevented his making a new one.

The agreement, therefore, whether made in good or bad faith, cannot affect the validity of a will previously made.

We are satisfied that upon the facts before us the decision and judgment of the Probate Court ought not to be disturbed. The findings of the Court are fully sustained, in our opinion, by a decided preponderance of evidence.

Judgment affirmed.

We concur: Morrison, C. J., Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed March 30, 1880.]

[No. 6284.]

W. C. HARRIS AND G. L. JACOBY, APPELLANTS,

vs.

MARIE HILLEGASS, RESPONDENT.

PARTNERSHIP—ACCOUNTING. Where three parties enter into an agreement, and intrust the investment and management of a certain sum from a common fund in an enterprise to one of them, with a stipulation that they shall share equally in the profits after deducting the amount of the investment, such agreement constitutes a copartnership, and an accounting may be had.

IDEM—STALE DEMANDS—EQUITY—LACHES. Delay in demanding a partnership accounting, to constitute *laches*, must have occured subsequent to the dissolution of the copartnership, and for so long a period as to make the claim *stale*.

Appeal from the Third District Court, County of Alameda.

Pringle & Hayne, for appellants.

S. V. Smith & Son, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

The complaint alleges that on the 26th of June, 1849, the plaintiffs and one William Hillegass, now deceased (the administratrix of whose estate and whose heirs are the parties defendant), were copartners, with equal interests, doing business in Philadelphia, Pennsylvania.

That on that day the firm sent Hillegass to California, and furnished him with the sum of $1,500 to defray his traveling expenses, "and to enable him to engage in digging gold and trading generally in said State on behalf of said firm." That in connection thereof Hillegass made and executed the agreement following:

"Know all men by these presents: That I, Wm. Hillegass, of the city of Philadelphia, State of Pennsylvania, about starting to California to dig gold, do firmly, truly, and sincerely promise, with Wm. C. Harris of the city of Philadelphia, State of Pennsylvania, and Geo. L. Jacoby of Sunnytown, Montgomery County, Pennsylvania, jointly, half the proceeds of my diggings and trading, or in whatever manner I obtain gold, metal, etc.—that is, after $1,500 are deducted, the amount loaned from the firm of Jacoby, Harris & Hillegass. Should my diggings, trading, etc., not amount to $10,000, then the aforesaid Wm. C. Harris and G. L. Jacoby, jointly, get one-third of the proceeds only; but should he get more than $10,000, then, as above stated, Wm. C. Harris

and Geo. L. Jacoby are to receive, jointly, one-half of the proceeds.

"Witness my hand and seal the 26th day of June, 1849.

"WM. HILLEGASS. [Seal.]

"Witness present, J. E. SHULTZ."

That thereupon the firm settled its business in Philadelphia, and discontinued the same therein. That in 1849 deceased came to California, and by and with the money aforesaid engaged in different kinds of labor, trade, and business in California, under and in pusuance of said contract on behalf of said firm, and continued so to engage until his death. That after the said 26th of June, 1849, and under and in pursuance of said contract, Wm. Hillegass aforesaid acquired, by and with the money aforesaid, large sums of gold, greatly exceeding $10,000, and purchased therewith, and acquired by and with the aid of the said $1,500, and by his trading on behalf of said firm, the following real and personal property. (Descriptions of the property follow, being descriptions by metes and bounds of a large number of separate lots or parcels of land and descriptions of stocks in certain mining corporations, and of other personalty.)

The complaint futher alleges that all of the property has passed into the hands of Marie Hillegass, administratrix.

The plaintiffs futher allege: "That all the property of any kind of which the said Hillegass was seized or posessed at the time of his death was obtained and acquired by the said deceased, under and in pursuance of the said contract, as partnership property and in trust for the several members of the said firm aforesaid, and the plaintiffs allege that the said William Hillegass, after he came to the State of California as aforesaid, never returned to the said city of Philadelphia; that he never accounted with the plaintiffs, nor with either of them, of and concerning what he had obtained and acquired in the State of California as aforesaid, and never gave nor delivered to the plaintiffs, nor to either of them, any part thereof, and never returned the sum of $1,500 nor any part thereof, and never accounted for the use thereof. That all of the said property was acquired and obtained as partnership property as aforesaid, and held by said Hillegass in trust for the joint benefit of the said Hillegass and of the plaintiffs, in the proportions in said contract expressed. That the said property is of the value of more than $10,000—to-wit, of the value of $185,000 or thereabouts—and the plaintiffs are entitled to one-half part thereof. That the plaintiffs have no knowledge or information whether the said Hillegass acquired any other property under the said contract

than what is hereinbefore described. And the plaintiffs allege on information and belief, and charge the fact to be, that for several years after the arrival of said Hillegass in the State of California, the results of the labor and trading of the said Hillegass were small and of little value; that thereafter the same gradually accumulated by reinvestments, and gradually increased in value; that a division and distribution of the same among the members of the firm before such accumulation and increase would have been injurious and destructive as well to the interests of the said Hillegass as to the interests of the plaintiffs; and that the said Hillegass, during his lifetime, from time to time stated to the plaintiffs by letters from the State of California that he would return to the said city of Philadelphia. That the plaintiffs having great trust and confidence in the said Hillegass, and expecting his return to the said city of Philadelphia, did not, for the reasons aforesaid, interrupt his labor and trading, nor require a discontinuance of the said partnership business or a divison of the said property, so long as the said Hillegass continued to carry on the said business in the State of California, and did not, during the lifetime of said Hillegass, demand any part of the said property, nor any account thereof. That the said Hillegass never dissolved the said partnership, nor repudiated the said trust, *and the same are in full force and virtue.* And the plaintiffs allege that the said William Hillegass died in said county of Alameda on the 20th day of March, 1876, being a resident of said county at the time of his death."

This is followed by averments that the defendants are the heirs at law of William Hillegass (who died intestate); that defendant Marie was duly appointed and qualified as administratrix, who caused the proper notice to creditors to be published; and that the claim of plaintiffs was duly presented, and that the claim was rejected by the administratrix.

The prayer is for a judgment decreeing that the said William Hillegass acquired and obtained all the real and personal property described on joint and partnership account, and that plaintiffs are entitled to one-half, and for an accounting, etc.

The defendants demur on the grounds that the complaint does not state facts sufficient to constitute a cause of action; that the cause of action is barred by the provisions of certain sections of the Code of Civil Procedure; and that the complaint is *ambiguous*,

The agreement of June 26, 1849, created a partnership between the plaintiffs and William Hillegass. In a contract of

partnership, the various covenants adapted to the circumstances of the particular case are entirely the subject of stipulation between the parties to it, where there is no contravention of some rule of law. (Story, section 23, citing Gow on Part.) Here then was both a community of interest in the original capital, and in the profit and loss. The $1,500 were advanced by the three parties to the contract, or from a fund in which the three were jointly interested, and, by the terms of the agreement, each of the three was to share in the losses, *at least* so far as the losses should constitute a charge upon, and diminution and deduction from, the profits. It is in this qualified sense that a participation in losses is requisite to constitute a partnership *inter sese*. (Story on Part., section 21.) The $1,500 were to be returned *only* out of the profits. This presents a marked distinction between the agreement recited in the complaint and the *receipts* construed by the Supreme Court of Alabama in the case relied upon by respondent's counsel. (*Smith* vs. *Garth*, 32 Ala. 368.)

There all of the receipts but one contained an absolute promise to pay the money loaned, with interest, in twelve months. The other receipt read: "April 18, 1843. Received of Jessie W. Garth $400, which I am to invest in lands at Lebanon; and he is to be repaid his money and interest back, and the profits are to be divided."

It was said by the Court that the *receipts* "disclosed a purpose and intent to repay the money *at all events*" (p. 373). And it was further said: "If it had been stipulated that *Garth* should be repaid the money advanced *out of the proceeds of the land when sold*, or out of any *partnership or joint effects*, he would then have been involved in the risk of the adventure" (p. 374). Here the plaintiffs were to receive a certain portion of the "proceeds (net profits) of the diggings and trading, * * after $1,500 are deducted," out of such proceeds. The mere use of the words "*loaned* from the firm of Jacoby, Harris & Hillegass" does not overthrow the manifest intent of the parties as derived from the instrument as a whole.

The complaint referred to in *Wheeler* vs. *Farmer*, cited by respondent (38 Cal. 203), contained none of the elements of a partnership contract.

It is insisted by respondents that the claim of the plaintiffs is a *stale demand*, which will not be entertained by a court of equity.

In considering this point, we shall assume—without so deciding—that when it appears by the allegations of the complaint that the demand is *stale*, the objection may be

taken under the general demurrer that the complaint does not contain facts sufficient to constitue a cause of action.

It is also urged that equity has refused relief on the ground of *laches* in cases of *partnership accounts*. However correct this statement, the cases cited in support of it have no application to the facts of the present. *Adams* vs. *Taylor*, 14 Ark. 62, was a bill filed for an accounting eight years after a *dissolution* of the partnership. *Ray* vs. *Bogart*, 2 Johns. Cas. 438, was a like suit brought *twenty years* after a dissolution by the death of one of the partners. In *Atwater* vs. *Fowler*, 1 Edw. Ch. 417, it was held that silence by one of two partners, in a *single partnership transaction* for thirteen years after receiving an amount from the other partner, was *an acquiesence* in the account. *Tatham* vs. *Williams*, 3 Hare. 159, does not seem to have any bearing upon the precise question; and *Harcourt* vs. *White*, 28 Beav. 311, did not involve any partnership account. *Codman* vs. *Rogers*, 10 Pick. 118, was a case where the executor of a deceased partner, having had a partial settlement with the surviving partner, lay by for seventeen years, and until after the death of the surviving partner, before taking any legal proceedings.

In all of the cases above referred to, the *delay* to demand an accounting occurred after the dissolution of the partnership by the death of a partner, or otherwise.

The complaint before us alleges, "that the said Hillegass never dissolved the said partnership, nor repudiated the said trust; *and the same are in full force and virtue.*"

In order to apply the doctrine of *stale demands* to this case, it devolves upon the demurrant to point out the allegations in the complaint which, taken as true, show that the foregoing statement is *not* true, but that the partnership was in fact dissolved at a date so long antecedent to the filing of the complaint as that the plaintiffs' claim for an accounting had become *stale.*

There is no averment in the complaint that the partnership was dissolved prior to the death of William Hillegass, and there is a very clear distinction between such an averment and the recital of evidentiary facts which may have a tendency to establish such dissolution. The statements in the complaint referred to, as showing a dissolution prior to the death of Hillegass, belong to the class of statements of *evidentiary* as distinguished from *ultimate* facts. Even where such statements, if admitted to be true, would establish *prima facie* an ultimate or pleadable fact, they cannot be substituted in a complaint or answer for an allegation of the fact to be put in issue. If there had been no averment

of the death of William Hillegass, it is plain that plaintiffs could not have relied upon the statements referred to as the equivalent of an allegation that the partnership had been dissolved, because the facts stated *might* have occurred and the partnership still continue. Nor can the statements of probative facts be given any greater effect, because they are relied upon by defendants as *admissions* on the part of the plaintiffs; they are simply admissions of facts tending to prove, but not conclusively proving, another fact. Although the circumstances alleged might be considered by the Court (or a jury) as tending *very strongly* to establish a dissolution or abandonment of the partnership long prior to that alleged in the complaint, their effect might be entirely overcome by the proof of other circumstances tending to show the continuance of the partnership; and even without evidence of such other circumstances, we cannot declare, as matter of law, that those alleged *could not possibly have co-existed* with the continuation of the partnership.

Judgment reversed and cause remanded, with directions to the Court below to overrule the defendants' demurrer to plaintiffs' complaint.

We concur: Ross, J., Morrison, C. J.

IN BANK.

[Filed March 23, 1880.]

[No. 7066.]

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. CHARLES L. TAYLOR,

VS.

THE BOARD OF ELECTION COMMISSIONERS, ISAAC S. KALLOCH, ET AL.

PROHIBITION—OFFICE OF WRIT. The office of the writ of prohibition is to restrain subordinate courts and inferior *judicial tribunals* from exceeding their jurisdiction.

Writ of prohibition.

A. L. Hart and *A. A. Cohen*, for petitioner.

John F. Swift and *J. P. Hoge*, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

This is an application for a writ of prohibition under chapter 3 of the Code of Civil Procedure. The office of the

writ is to "arrest the proceedings of any tribunal, corporation, board, or person, when such proceedings are without, or in excess of, the jurisdiction of such tribunal, corporation, board, or person."

The petition shows that the defendant, the Board of Election Commissioners, was created by "An Act to regulate the registration of voters, and to secure the purity of elections in the city and county of San Francisco," approved March 18, 1878; and that the defendants named, Isaac S. Kalloch and others, compose said Board. It further appears that at a meeting of the said Board, held on the 4th day of March, 1880, the following resolution was adopted:

"*Resolved*, That it is the sense of the Board of Election Commissioners for the city and county of San Francisco that an election should be held at an early day, for the purpose of electing fifteen freeholders to prepare and propose a charter, to be submitted to the voters of said city and county, as provided by section 8, Article XI, of the Constitution of California."

It also appears from the petition that the said Board on the same day adopted another resolution, to the effect that a special election be held in said city and county on the 30th day of March, 1880, for the purpose of electing fifteen freeholders to prepare and propose a charter for said city, under said Constitution, and that the qualified voters of said city and county be duly notified to meet in their respective election precincts on Tuesday, the 30th day of March, 1880, for the purpose of said election; and that in pursuance of said last mentioned resolution the said Board made and published the following notice:

"Public notice is hereby given that a special election in and for the city and county of San Francisco, State of California, will be held on Tuesday, the 30th day of March, 1880; and the qualified voters of said city and county are hereby called to meet in their respective election precincts on said day, at said special election, for the purpose of electing fifteen freeholders, who shall have been for at least five years qualified electors of said city and county, to prepare and propose a charter for said city and county, as provided for in the Constitution of said State and said resolution."

It is charged in said petition that the action of said Board of Election Commissioners, in making the order for said election, was in excess of the powers and jurisdiction of said Board, and in violation of the Constitution and laws of the State; and that if said election be allowed to proceed, the

expense thereof will exceed the sum of $30,000, all of which will be drawn out of the treasury of said city. Petitioner alleges that he is a taxpayer of said city, and as such applies for the writ. On the return day the defendants appeared and filed their demurrer to the petition. The following is the only ground of demurrer which it will be necessary for us to notice:

"That it appears upon the face of said affidavit, petition, and papers, taken as true, that the action had by said Board of Election Commissioners, and complained of in said affidavit, etc., is not, nor is any part thereof, in any sense a judicial proceeding, nor otherwise the subject of examination by this Court, through or by its writ of prohibition."

We are of the opinion that the demurrer is well taken, and should be sustained. The question presented by it has been passed upon by this Court in two recent cases—the first being the case of *Spring Valley Water Works* vs. *The City and County of San Francisco*, 52 Cal. 111; and more recently in the case of *Maurer* vs. *Mitchell*, 53 Cal. 289. In the first case above mentioned, Justice McKinstry, delivering the opinion of the Court, says:

"At the common law, the writ of prohibition was issued on the suggestion that the cause originally, or some collateral matter arising therein, did not belong to the inferior jurisdiction, but to the cognizance of some other court. (3 Shars' Blackstone's Com. 112.) It was an original remedial writ, provided as a remedy for encroachment of jurisdiction. Its office was to restrain subordinate courts and inferior *judicial tribunals* from exceeding their jurisdiction. (*Quimbo Appo* vs. *The People*, 20 N. Y. 540; *Thomas* vs. *Mead*, 36 Mo. 232.) And again, in the very late case of *Maurer* vs. *Mitchell*, Tax Collector, etc., reported in 53 Cal., the Supreme Court uses the same language, and adopts the same view of the law."

In no sense was the action of the Board of Election Commissioners complained of, and sought to be reached by prohibition, judicial in its nature; and whether it was legislative or simply ministerial, we are not now called upon to determine.

In sustaining the demurrer to the petition, we express no opinion upon the regularity or legality of the proceedings taken by the Board of Election Commissioners.

Demurrer sustained and writ denied.

We concur: Thornton, J., Ross, J., Myrick, J., Sharpstein, J., McKee, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed March 24, 1880.]

[No. 6424.]

JOHN H. SIEMERS, RESPONDENT,

vs.

FRANCIS T. EISEN, APPELLANT.

PRACTICE—INSTRUCTIONS—WHEN PROPER INSTRUCTIONS MAY BE OMITTED. If the charge of the Court to the jury covers all the principles of law embodied in instructions asked for and refused, it was not error to refuse them, though they were correct.

NEGLIGENCE. Where an ordinance of a city prohibits the leaving of animals on the public streets unfastened, while having or using the same, negligence is presumed, and must be charged by the Court, and not left to the jury, when it is shown that the ordinance has been violated.

RIGHT OF ACTION—DAMAGES. Every person injured by the violation of such an ordinance is entitled to a civil remedy for such injury.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

W. S. Goodfellow, for respondent.
King & Rodgers, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiff brought this action to recover damages for injuries caused by a runaway horse belonging to the defendant. The case was tried before a jury, and a verdict was rendered in favor of the plaintiff for $1,400 damages. Defendant moved the Court for a new trial, which was denied, and this appeal is taken upon questions of law and fact.

The evidence relating to the injury is very brief, and remarkably free from conflict. The witness Mysell states that defendant's wagon (a small buggy) stood at the corner of Ninth and Minna streets, where there is a grocery store. The driver of the buggy was coming out of the store, where he had been soliciting business; and when he came out he was about twenty-five feet from where the horse stood. As he came out of the store "he beckoned to the horse, making a chirping sound with his lips," and then walked across Ninth Street to go to another grocery store on the opposite side of the street. He did not go in front of the horse, but stepped into the middle of the sidewalk, and crossed over the flags, the horse following him gently on the street; "and when the

horse got to the curve there was a little rut there; it was put there for a track, and the light buggy made a jump, whereupon the horse looked back, and immediately started to run." The driver was standing by the corner, and called the horse to stop, but he did not stop. At the time the horse started to run away, the driver was standing from ten to fifteen feet distant. The evidence of the driver differs in some slight particulars, but is substantially the same. The plaintiff was run over when in the act of crossing Minna Street, and was severely injured. It further appears from the evidence that the horse was a gentle animal, and had been trained to follow the driver.

On behalf of appellant it is claimed, in the first place, that the Court below erred in refusing to give certain instructions asked for by defendant. These instructions relate to the questions of negligence, contributory negligence, and damages. There is no doubt that several of these instructions were correct, and should have been given; but an examination of the charge of the Court to the jury will show that all the principles of law embodied in the instruction refused were fully covered by the charge. This was sufficient under numerous decisions of this Court. Indeed, the charge of the Court on the question of negligence on the part of defendant or his employee was more favorable than the facts of the case demanded; for the Court left the question of defendant's negligence to the jury, instead of charging them that the proof fully established it. There is no doubt that the horse was left on the public street unfastened, in violation of the following ordinance, which was put in evidence in the case:

"No person having or using any animal, except it be attached to a dray, truck, cart, or water-cart, shall leave such animal without securely fastening the same; and no person having or using any animal attached to a dray, truck, cart, or water-cart, shall leave such animal without first securely locking the wheels of the vehicle to which it shall be attached."

This ordinance was intended to subserve a good purpose, and doubtless would do so if strictly enforced. The practice of leaving animals attached to vehicles unfastened upon our public streets, and thus placing in jeopardy the lives of men, women, and children, should not be tolerated. It is, in fact, condemned by the law; and when damages result therefrom, the owner of such animal should be held to a strict legal accountability. It will be sufficient to refer to two or three authorities in this connection.

"The failure of any person to perform a duty imposed upon him by a statute or other legal authority should always be considered evidence of negligence, *or of something worse.* Whether it constitutes such negligence as tended to cause the injury to the plaintiff, in any particular case, is another question, the principles governing which are stated elsewhere; but such an omission must constitute just cause for complaint on the part of the State, if not of individuals; and when no evil intent appears, the omission may properly be regarded as simple negligence. The omission to perform a legal duty being proved, the plaintiff ought not to be required to prove further that the act omitted was inherently essential to the exercise of due care by the defendant. Thus, if a railroad company is required by law to fence its track, to ring bells, or to give other warnings of danger, or if one building a wall is required to make it of a certain thickness, or if obstructions to a street are prohibited, a violation of any of these legal regulations is sufficient evidence of negligence." (Shearman and Redfield on Negligence, section 13 *a.*)

"So, if a specific duty is imposed upon any person by law, or by legal authority, an action may be sustained against him by any person who is specially injured by his failure to perform that duty." (Section 54 *a.*)

"It is an axiomatic truth that every person while violating an express statute is a wrong-doer, and as such is *ex necessitate* negligent in the eye of the law; and every innocent party whose person is injured by the act which constitutes the violation of the statute is entitled to a civil remedy for such injury, notwithstanding any redress the public may also have." (*Jetter* vs. *N. Y. & Harlem R. R. Co.*, 2 Abbott, 464.)

The only remaining question is that of damages. It is claimed that $1,400 was an excessive verdict, and should therefore have been set aside by the lower Court. The evidence relating to the extent of the plaintiff's injuries was conflicting, and we are not prepared to say that the jury gave him more than he was entitled to receive.

The charge of the Court upon the subject of damages was clear and strictly correct, and in our opinion this is not a case for reversal on the ground that the damages were excessive.

We find no error in the proceedings, and therefore the judgment and order are affirmed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed April 1, 1880.]

[No. 6488.]

F. H. BURKE, APPELLANT,

vs.

J. H. TURNEY ET AL., RESPONDENTS.

STREET ASSESSMENT—NOTICE OF AWARD—POWER OF SUPERINTENDENT. Under the Act of April 1, 1872, the Superintendent of Streets has no power to enter into a contract before the expiration of five days after the first publication of the award. His action would be *void*.

EVIDENCE. It is incumbent on the plaintiff, in an action for street assessment, to prove that the five days had elapsed before the Superintendent entered into the contract. If he proves it by the introduction of the assessment, warrant, etc., such *prima facie* evidence may be disproved by the defendant.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

D. H. Whittemore, for appellant.
Cope & Boyd, for respondents.

MCKINSTRY, J., delivered the opinion of the Court:

The sixth section of the Act of April 1, 1872 (Statutes 1871-2, p. 804), provides: "Notice of such award (of a contract) shall be published for three days; and within five days after the first publication of the award, the owners of a majority of the frontage of lots and lands liable to be assessed for said work * * * may elect to do said work, and enter into a written contract to do the whole work at the price for which the same is awarded," etc.

In the case before us the first publication of the award was made July 6, 1876. On the 10th day of July (less than five days after the first publication) the plaintiff and the Superintendent of Streets entered into the contract which is the basis of the present proceeding.

The Superintendent had no *power* to enter into the contract until after the expiration of the five days. (*Hewes* vs. *Reis*, 40 Cal. 255; 45 *Id.* 279; 36 *Id.* 512; 30 *Id.* 536; 31 *Id.* 481; 34 *Id.* 281; 40 *Id.* 497; 50 *Id.* 210.)

The premature action of the Superintendent was one which affected his *power* or *jurisdiction*. His action was *void;* and that which was void does not become valid by reason of

a failure to appeal. The property owners were not *aggrieved;* and the failure of the contractor to appeal, did not operate—first, to *create* a grievance on the part of the defendants; and second, to *estop* them from complaining of it.

Nor was the evidence showing that the five days after the first publication of the award had not expired when the contract between the Superintendent of Streets and the plaintiff was entered into, an *affirmative defense*. It is not necessary, therefore, to decide whether the Legislature *can* deprive a defendant of any other defenses than those specifically mentioned in the statute.

By another statute the *assessment, warrant,* etc., are made *prima facie* evidence of the right of the plaintiff to recover —that is, of the regularity of all the proceedings of the several officers whose action preceded and resulted in the assessment. But this is a rule of *evidence,* not of *pleading*. Assuming that the statutory form of complaint is sufficient, still the essential facts (which such form is supposed to allege, although they are not in fact alleged) must be proven before the plaintiff is entitled to a decree. Among these is the fact that the *five days* above mentioned and referred to had passed when the contract was made by the Superintendent. The introduction of the assessment and diagram by plaintiff proved *prima facie* that five days had elapsed after the publication of the award, before the contract was let by the Superintendent of Streets, but proved it only *prima facie;* and there can be no doubt that it was competent for defendants to *disprove* or overcome the evidence of that which it was incumbent on plaintiff in the first instance to establish. The plaintiff was not entitled to a decree unless the five days had expired when his contract was made. The evidence of the defendants proved that the five days had not expired. If the defendants were not authorized to show that the five days had not expired, then was the assessment, etc., not merely *prima facie,* but conclusive evidence that the plaintiff was entitled to recover.

To give all the effect claimed for the Act of the Legislature by the appellant, the plaintiff need not *allege* the matters which alone give him a cause of action, and he need not *in fact* prove them; while to meet the possibility that both of these obstacles might be overcome, the defendant is prohibited from alleging or proving anything but the three matters, the privilege of pleading which is accorded him by the statute.

Judgment affirmed.

We concur: Ross, J., McKee, J.

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Current Topics.

THIRTY-two pages more of opinions of our Supreme Court appear in this number. Many of them are very important. Resort must be had to the JOURNAL for complete files of these opinions.

UPON reflection, one must know that the *privilege* and *duty* conferred upon the chief executive officer of the State by the Constitution, respecting the approval or rejection of bills passed by the Legislature, should be exercised by him with sound judgment, both as to the *constitutionality* and *merits* of the measure; and that it should be *his* judgment. Yet we are told that the so-called "McClure Charter" received the signature of the Governor because two-thirds of the "Council of Two Hundred" so petitioned. It cannot be doubted that the provisions of the Constitution are wise ones, which remove from the Legislature (as we construe them) the enactment of all laws designed to be applicable to the government of cities and counties heretofore organized. When the approval of a measure is made to depend upon the petition of any majority part of some civil or political organization, the virtue of such provisions is made apparent.

THE Supreme Court of this State begins its term at Sacramento on Monday, May 10, 1880.

Supreme Court of California.

DEPARTMENT NO. 1.

[Filed April 6, 1880.]

[No. 5981.]

HARDING, RESPONDENT, vs. MINEAR, APPELLANT.

PRACTICE AND PLEADING—SUPPLEMENTAL ANSWER—WHEN IT MAY BE FILED. A motion to file a supplemental answer is addressed to the sound legal discretion of the Court, and its ruling in allowing or refusing it will not be regarded as erroneous unless there should be an evident abuse of discretion.

BANKRUPTCY—PLEADING DISCHARGE BY SUPPLEMENTAL ANSWER—RELEASE OF ATTACHMENT—INEQUITABLE DEFENSES. Where defendant's property had been attached more than four months before he instituted proceedings in bankruptcy, and he had given an undertaking for the release of the property, it is not an abuse of discretion for the Court to refuse to permit the defendant to file a supplemental answer setting up his discharge as a bar to the prosecution of the action. Such defense is inequitable.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco County.

Drake & Rix, for respondent.
Craig & Meredith, for appellant.

McKEE, J., delivered the opinion of the Court:

Property of the defendant was taken by a writ of attachment issued in this action at the commencement thereof; and upon the defendant giving an undertaking with sureties, as required by section 555 of the Code of Civil Procedure, the attachment was discharged and the property released.

More than four months after the commencement of the action, the defendant instituted proceedings in bankruptcy; and when he had received his certificate of discharge, he applied to the Court below in this action for leave to file a supplemental answer, setting up his discharge in bankruptcy as a bar to the further prosecution of the action. The Court denied the motion, tried the case on the issue joined by the complaint and answer on file, and gave judgment against the defendant, from which the defendant appeals, and assigns as error the action of the Court in denying his motion to file the supplemental answer.

Section 464 of the Code of Civil Procedure declares that the plaintiff and defendant respectively may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former com-

plaint or answer. Construing the section of the New York Code applicable to this subject, the courts of that State have decided that the section was intended as a substitute for the former practice in actions at law of a plea *puis darrein continuance*. In *Hoyt* vs. *Sheldon*, 4 Abbott, 54, it was said that a supplemental answer shall be given in actions at law in all cases in which a plea *puis darrein continuance* could have been put in as a matter of right. (*Garner* vs. *Hanna*, 6 Duer; *Slauson* vs. *Englehart*, 34 Barb.; *Bates* vs. *Fellows*, 4 Bosw.)

It was the practice in common law courts, after issue joined in an action, to give a day for the parties to appear in court by an entry upon the record. This was called the continuance, because thereby the proceedings were continued without interruption from one adjournment to another. (Blacks., Vol. III, p. 316.) In progress of law the entry on the record became mere matter of form, and might be made at any time to make the record complete; and subsequently, by an Act of Parliament, it became unnecessary to make entry of the continuances at all. But if a new matter of defense arose in a case after issue joined, and between the last continuance and the day set for the reappearance of the parties, the defendant was entitled, on the day for reappearance, to plead it as a matter which had happened after the last continuance, or, as the practice was modified by subsequent legislation, after the last pleading. The effect of such a plea, when pleaded, was not to impugn the right of action altogether, but only the right of maintaining it—*i. e.*, since the period when matter of defense arose. The plea itself was considered as a waiver of all previous pleas, and the cause of action was admitted to the same extent as if no other defense had been made but that contained in such plea. (*Wallace* vs. *McConnell*, 13 Pet. 136; *Yeaton* vs. *Lynn*, 5 *Id.* 223; *Spofford* vs. *Woodruff*, 2 McLean, 191.)

But the plea had to be allowed by the Court. It was in the breast of the judge at *nisi prius* whether he would accept it or not; therefore it was necessary for the party to make it appear to the judge that it was a true plea. (7 Bacon's Abridg. 688.) Thus in *Abbot* vs. *Rugelsby*, 26 Car. 11, cited in *Bunker* vs. *Ash*, 9 Johns. 250, it was held that he that offers a plea *puis darrein continuance* at the *nisi prius*, must prove it there; for unless he make it appear to the judge that it is a true plea, it is in his discretion whether he will allow it or not, but may proceed to try the cause. And in *Hawkins* vs. *Moor*, Cro. Car. 261, it is said that such a plea is receivable at the discretion of the justices, if they

perceive any verity in it. That practice was followed in the common law courts until the time of the codes. Say the Court, in *Morgan* vs. *Dwyer*, 10 Johns.: "It rests in the discretion of the Court to receive such a plea or not, even after more than one continuance between the time that the matter of the plea arose and the coming in of the plea; and this discretion will be governed by circumstances extrinsic, and which cannot appear on the face of the plea." And in *Curry* vs. *Smith*, 50 Me., it is said: "Whether the defendant should be allowed to plead *puis darrein continuance* is a matter of discretion with the Court. The exercise of this discretion *is never matter of exception.*" (See also *Rowell* vs. *Hayden*, 40 Me. 586; *Wilson* vs. *Hamilton*, 4 S. & R. 238; *Lyon* vs. *Marclay*, 1 Watts, 261; *Juff* vs. *Gibbon*, 19 Wend. 240.) This discretion could not be invoked until after the plea had been served, and then it was exercised on a motion to set aside. (7 Bac. Abridg. 688; *Morgan* vs. *Dwyer*, 10 Johns. 249.)

But the Codes produced a change in the practice and in the name of the plea; so that now, instead of filing it or its substitute—a supplemental answer—as a matter of course, and moving, after it has been served, to set it aside, application must be made, under the Code, on motion or order, to show cause for leave to file it all. The right to file a supplemental answer is, therefore, not an absolute and positive right, but is made to depend on the leave of the Court in the exercise of a legal discretion. And say the Appellate Court of New York: "The Court must grant leave, unless the motion papers show a case in which the Court may exercise a discretion as to granting or withholding leave. * * The application may be refused if the new defense, although legal, is *inequitable.* (*Medbury* vs. *Swan*, 46 N. Y. 200; *Holyoke* vs. *Adams*, 59 *Id.* 233.)

Applying this principle to the proceedings had in the case in hand, and it is difficult to resist the conclusion that it would have been inequitable to have allowed the defendant in the case to have interposed his discharge in bankruptcy as a plea in bar to a further prosecution of the action; for the plaintiff had, by his diligence, obtained an attachment lien upon the property of the defendant. That lien was acquired more than four months before the defendant commenced his proceedings in bankruptcy; and, according to the provisions of the bankrupt law, the attachment was not dissolvable by the discharge of the defendant. The only effect of the discharge was to limit the judgment recoverable in the attachment suit. The plaintiff was entitled, at least,

to a judgment for the enforcement of his attachment lien. (*Dagget* vs. *Cook*, 37 Conn. 345; *Bates* vs. *Tappan*, 99 Mass. 376; *Doe* vs. *Childress*, 21 Wall. 642; *Sacramento Bank* vs. *Hadley*, 2 Pac. C. L. J. 470.) The case in hand does not fall within this class of cases only because the attachment was discharged, and the attached property released; but it was released upon giving the undertaking required by law for that purpose. The undertaking was therefore given as a substitute for the attachment lien, and to secure a re-delivery of the attached property or payment of its value, to be applied to the payment of any judgment recoverable in the case.

If the proceedings in bankruptcy would not have had the effect, under the bankrupt law, of discharging the attachment which had been levied upon the property of the defendant if an undertaking had not been given, they will not have the effect of releasing the undertaking which was given. If it would be illegal or inequitable to deprive the plaintiff of the benefit of his attachment lien, it will be equally so to deprive him of the benefit of that which has been taken in law as a substitute for it. The law, therefore, will not require of a court to permit a supplemental answer to be filed which might produce such injustice. The case of *Holyoke et al.* vs. *Adams et al.* is directly in point. In that case, as in the case in hand, attachments were issued and levied upon sufficient property of the defendants, which was released by giving an undertaking with sureties. More than four months after, the defendants were severally adjudged bankrupts; and they, immediately after obtaining their certificates of discharge, moved the Court in which the action was pending for leave to file a supplemental answer, setting up their discharge. Leave was denied, and the Court of Appeals, in closing their decision, say: "On the whole, it seems that the spirit of our own statute and the spirit of the Bankrupt Act will be satisfied, and that injustice will be avoided, if this case shall be put in the class of those in which it is discretionary with the courts to refuse leave to put in a supplemental answer." And in a like case, in which a writ of review had been taken to review a judgment rendered under similar circumstances, the Supreme Court of New Hampshire says: "Courts will sometimes set aside a plea *puis darrein continuance* when it is manifestly fraudulent, and against the justice of the case. (1 Ch. Pl. 161.) To permit a party to prosecute his writ of review, not for the purpose of reversing an erroneous judgment, but for the sake of preventing the satisfaction of an honest debt and for discharging a lawful security, by interposing proceedings in

bankruptcy contrary to any beneficent design of the law,' would be to lend the aid of the Court to the consummation of gross injustice." (*Zollar* vs. *Janvrum*, 49 N. H. 18.)

It follows that a motion to file a supplemental answer is addressed to the sound legal discretion of the Court; and its ruling in allowing or refusing it will not be regarded as erroneous, unless there should be an evident abuse of discretion.

We see no abuse of discretion in this case, and the judgment is affirmed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed March 25, 1880.]

[No. 6364.]

HIBERNIA SAVINGS AND LOAN SOCIETY, RESPONDENT,
vs.
CHAS. FELLA, A. A. B. FELLA, AND ANNA EMIG, APPELLANTS.

AMENDMENT OF JUDGMENT.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Tobin & Tobin, for respondent.
Wm. Leviston, for appellant.
T. F. Bachelder, for Anna Emig.

By the Court:

It is ordered that so much of the judgment in said cause as adjudges that the defendant Anna Emig recover from her co-defendant, Charles Fella, the sum of $3,000, with legal interest from April 9, 1877, and $242.25 costs, and that said Anna Emig hold a lien for said amounts on the real property described in said judgment, be stricken out, and that the remainder of said judgment stand, and that the cause be remanded to the Court below to give leave to the defendant Anna Emig to serve her answer on the defendants affected thereby; and after issue joined therein, or in case of default to plead thereto, to determine the matters in controversy between said parties defendant, and dispose of the surplus proceeds of sale, if any there be, in accordance with the rights of the respective parties.

And it is further ordered that the appellants recover from the defendant Anna Emig the costs of the appeal.

DEPARTMENT NO. 2.

[Filed March 22, 1880.]

[No. 6104.]

WARREN OLNEY, APPELLANT,

vs.

SIMEON SAWYER AND THEODORE E. BAUGH, RESPONDENTS.

TENANT IN COMMON—RIGHT OF POSSESSION—PURCHASE OF OUTSTANDING TITLE. Where two or more tenants in common are in possession of land claiming it as their own, one of the tenants in common cannot purchase an outstanding title and use it to keep out of possession his co-tenant.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

Warren Olney, for appellant.

E. A. Lawrence, for respondents.

THORNTON, P. J., delivered the opinion of the Court:

This action was brought by Olney against Sawyer and Baugh to recover possession of a lot of land situate in the city and county of San Francisco. Judgment was rendered for defendants on the findings, from which plaintiff prosecutes this appeal on the ground that the facts found do not support the judgment.

The Court found that in September, 1866, one Charles D. Carter was the owner and in actual possession of the portion of land in controversy; that on the 13th day of April, 1867, one W. M. Dowling intruded into such possession and ousted Carter therefrom; that on the 8th day of May, 1867, Dowling conveyed the premises to William Winter and Simeon Sawyer (defendant), at the same time having entered into an agreement with Winter and Sawyer that he should remain in possession of the premises as their tenant. The Court further found that Dowling did remain in possession of the premises as tenant of his grantees until the 26th of October, 1870, when he surrendered possession to the defendants, who have ever since been in possession; that on the 30th of September, 1869, Winter conveyed his interest in the lot sued for to Herman Wendt; that on the 18th of April, 1873, Wendt conveyed the same interest to George Brown; that on the 6th of October, 1873, Brown conveyed the same to plaintiff; that the second and third deeds just above mentioned were not recorded; that defendant Sawyer on the 3d of July, 1867, conveyed his interest in the premises to Paul Carns; that on

the 3d of November, 1869, Carns conveyed the same interest to defendant Sawyer and E. A. Lawrence; that defendant Sawyer conveyed to defendant Baugh on the 4th of April, 1870; that E. A. Lawrence conveyed to John R. Greenough on the 8th of December, 1870, and Greenough on the 21st of December, 1870, conveyed to defendant Sawyer; that on the 30th of November, 1870, Charles D. Carter conveyed his interest in the parcel of land to defendant Baugh, and on the 3d of December, 1870, Baugh conveyed one-half of the interest derived from Carter to E. A. Lawrence; that plaintiff, or those through whom he claims, never offered to repay defendants any portion of the money which they had payed for the interest of Carter, nor did the defendants, or either of them, or E. A. Lawrence, ever notify plaintiff or his grantors of the purchase from Carter, or demand contribution therefor, but it is found that their deeds of conveyance were duly recorded; that before the complaint was filed, plaintiff demanded to be let into possession of the lot as a tenant in common with defendants, and was refused.

At the time of the purchase and conveyance from Carter by Baugh, he, with defendant Sawyer, was in possession and holding possession. They obtained possession by the surrender of it to them by Dowling on the 26th of October, 1870, at which time Dowling was the tenant in possession, and holding possession for defendants and their co-tenants in common. Hermann Wendt, under whom the plaintiff claims, was then a co-tenant in common with the defendants, to whom the surrender was made.

The entry of Baugh and Sawyer as found, under one holding possession for all the tenants in common, was as tenants in common. It does not appear that they at that time disclaimed that relation, or that they then entered in hostility to their co-tenants. (*Wright* vs. *Sperry*, 21 Wis. 337.) We are satisfied that Baugh and Sawyer were there holding possession for themselves and Wendt, and that Wendt should be regarded, under the circumstances, as having been in possession with them on the 30th day of November, 1870, when the conveyance to Baugh by Carter was executed.

In this state of the case the question arises whether, where two or more tenants in common are in possession of land claiming it as their own, one of the tenants in common can purchase an outstanding title and use it to keep out of possession his co-tenant. Such is the question presented here for our consideration and determination.

It is contended on behalf of plaintiff that the defendants cannot, under the facts appearing in the case, set up the title

acquired from Carter, which is found to be *the true title* to the lot sued for. To sustain this contention we are referred to the case of *Bornheimer* vs. *Baldwin*, decided by the late Supreme Court at the October Term, 1871, and reported in 42 Cal. Reports, at p. 27. In this case it was held that the defendant could not be permitted, "if entering and remaining in possession as a tenant in common, to assail the common title or call its validity in question." (42 Cal. 34.)

To sustain the opposite view, counsel for defendants cite the case of *Lawrence* vs. *Webster*, 44 Cal. 385. This case was decided at the October Term, 1872, and in it one tenant in common was allowed against another to assail the common title and call its validity in question by using, to protect his possession, an outstanding title which he had purchased. In the opinion in this case, no reference was made to *Bornheimer* vs. *Baldwin*, nor does it appear from the meagre report of the argument of the cause that it was alluded to in any way by counsel.

It will be seen on examination that there was a fact in *Bornheimer* vs. *Baldwin* entirely absent in *Lawrence* vs. *Webster*. In the first case (*Bornheimer* vs. *Baldwin*), the defendant assailing the common title is treated as occupying the status of a tenant in common entering and remaining in possession as such tenant. In the latter case (*Lawrence* vs. *Webster*), it does not appear that the defendants who set up the outstanding title were in possession, or in any way acknowledging such relation to exist. The Court in its judgment obviously treated the status of the defendants as one of a mere tenancy in common, arising by operation of law on the conveyances introduced in evidence, unaccompanied by any acknowledgment that they held possession as such. On the contrary, the case shows the possession of defendants to have been held from its inception in hostility to any such relation.

An examination of the case (*Lawrence* vs. *Webster*), as stated by the Court, shows the correctness of this view. The action was ejectment for a tract of land in Contra Costa County, known as the "Esperanza Rancho." Ynocencio Romero and his two brothers claimed the "Romero Sobrante," which included the lands sued for, and in 1852 Ynocencio executed a deed to one Wood, which purported to convey the lands in controversy. The undivided half of the interest thus conveyed vested by mesne conveyances in Leonard, the grantor of plaintiff; and the other undivided half by mesne conveyances became vested in Lathrop, the grantor of defendants. Subsequently Leonard executed to Lathrop a lease of an undivided half of the premises for the term of

one year, commencing October 1, 1857. The last payment of rent was made in 1861 or 1862. The action was commenced on the 16th of June, 1868. The defendants entered in 1861, but they had no knowledge of the lease. The claim of the Romeros was held invalid by the Board of Land Commissioners and the District Court, which judgment was on appeal affirmed by the Supreme Court of the United States at the December Term, 1863. A decree of confirmation was made to Carpentier and others of the Rancho San Ramon, which included the land sued for, and in pursuance of this decree a patent was in 1866 issued to the confirmees. In 1865 a contract for the sale of the Rancho San Ramon was entered into between Carpentier and certain persons, of whom one was McNair, and it was thereby agreed that the purchasers might take immediate possession of the rancho. In 1866 McNair conveyed the premises in controversy to two of the defendants, Webster and Worden. This is a full statement of the facts of this case, as shown in the report.

The plaintiff, in support of his right to recover, took two positions, which he endeavored to maintain. In the first place he relied on the lease executed by Leonard (his grantor) to the grantor of defendant Lathrop, and the fact that the defendants entered under their conveyances from Lathrop. Secondly, that by virtue of the tenancy in common existing between him and the defendants, the purchase by the defendants of the title from Carpentier inured to his benefit. The Court proceeds to consider and dispose of the first proposition. This it does by virtue of the provisions of the 14th section of the Statute of Limitations then in existence (identical with section 326, C. C. P.) It holds that under this section of the statute, the plaintiff could not rely on the lease upon the facts as they are made to appear, but must prove title in the same manner that he would have been required to do had there been no lease. "Here," said the Court, "the evidence clearly shows that the defendants have acquired another title—that is to say, the right of possession under the contract for the sale of the San Ramon Rancho, and that since their entry in 1861 they have held adversely to Leonard and the plaintiff."

The Court came to the conclusion that the plaintiff, having proved no title at all, the lease did not aid him, under the circumstances as they existed, in maintaining a right to recover. In relation to the second proposition stated above, the Court uses this language: "Whether the proposition be based on the tenancy in common subsisting between Leonard and the defendants in respect to the interest acquired under the deed

from Romero, or on the fact that the defendants became the tenants of Leonard of his undivided half of the premises, it cannot be sustained in this case. The plaintiff, under the pleadings in this case, must rely on legal title; and if he seeks to obtain the benefit of the purchase which the defendants have made, he must resort to a court of equity, where all the matters relating to the transaction may be investigated, the expenses attending the purchase be properly apportioned, and the title acquired by the defendants, or some portion of it, be transferred to the plaintiff, if it be found that in equity the purchase inured to his benefit. These matters cannot be adjudicated in an action at law."

In the case before us it does not appear that the defendants held adversely, or that they in any way or mode denied the existence of a tenancy in common until the refusal to let plaintiff into possession on the day this action was begun, in which tenancy Wendt, under whom plaintiff in this action claims, was a tenant in common with them. On the contrary, they acquired the title from Carter, when in possession acknowledging the co-tenancy, their co-tenant having no knowledge of any such purchase or conveyance. The case as presented, it appears to us, comes within the rule laid down in *Bornheimer* vs. *Baldwin*.

It is contended on behalf of the respondents that the rule as declared in *Bornheimer* vs. *Baldwin* is an *obiter dictum*. We cannot so regard it. The question appears to have been made on the argument by the appellants, and urged as a reaon why the judgment should not be allowed to stand, that the respondent (plaintiff below) based his right to recover on an immoral contract, under the terms of which contract the tenancy in common claimed by plaintiff was attempted to be made out. On a tenancy in common thus created, the appellant argued that a recovery should not be had; and as the judgment rested on such a tenancy in common, that it should be reversed.

The Court doubtless concluded—and properly concluded—that as the cause was to go to a new trial, it was proper to settle the law as to this question, which would arise on such new trial, and in reply to this position used this language at the close of the opinion: "If the case of the plaintiff be otherwise established, the defendant cannot defeat it by the application of the maxim, "*En dolo malo non oritur actio*," nor set up in his defense that both he and the plaintiff entered upon the premises wrongfully in the first instance. Upon well settled principles he cannot be permitted, if entering and remaining in possession as a tenant in common, to assail

the common title, or call its validity in question." (42 Cal. 34.) We do not feel at liberty to disregard this decision.

The defendants cannot then use the title acquired from Carter to keep the plaintiff out of the possession of the interest which he has derived from Wendt, to all of whose rights he has succeeded. When the plaintiff has been so let into possession, defendants will then be at liberty to make their title available by an appropriate action.

The judgment will be reversed and the cause remanded, with directions to enter a judgment for plaintiff on the findings for an undivided half of the lot sued for. So ordered.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed April 7, 1880.]

[No. 6379.]

W. B. CARR, RESPONDENT, vs. M. CRONAN, APPELLANT,

AND

W. B. CARR, RESPONDENT, vs. H. McMURRY, APPELLANT.

FINDINGS—NON-WAIVER—BILL OF EXCEPTIONS—CONTINUANCE—CROSS-ACTION—EVIDENCE—PATENT.

Appeal from the District Court of the Third Judicial District, Alameda County.

Wm. Irvine, for respondent.
M. Mullany, for appellants.

By the Court:

1. The question that there were no findings in these cases cannot be considered on this appeal, because the fact of non-waiver of findings does not appear in the bill of exceptions. (*Smith* vs. *Lawrence*, 53 Cal. 34.)

2. The Court below did not err in refusing a continuance because a cross-action in equity had been commenced by the defendants against the plaintiff in the actions.

3. There was no error in overruling the objections to the record of the patent from the United States to the Central Pacific Railroad Company. Such record was admissible as evidence.

Judgments affirmed.

IN BANK.

[Filed April 9, 1880.]

[No. 10,450.]

THE PEOPLE, RESPONDENT,
vs.
JAMES ANTHONY, APPELLANT.

CRIMINAL LAW—EVIDENCE—CONSPIRACY. Where the defendant is being tried for advising and encouraging the commission of murder, it is error to admit as evidence against the defendant a conversation between him and one of the conspirators, relating to a former separate and independent act of the defendant, which bore no relation to, and had no connection with, a *concerted plan or common object.*

Appeal from the District Court of the Twenty-second Judicial District, Mendocino County.

Attorney-General, for respondent.

McGarvey & Carothers, Creed, Haywood, and *J. K. Chambers*, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

The defendant was tried and convicted in the late District Court of Mendocino County of the crime of murder in the first degree, and was sentenced to imprisonment for life in the State Prison.

James Anthony and Jesse Anthony, brothers, and one Lizzie Shrum were jointly indicted for the crime of murder, alleged to have been committed in said county of Mendocino on the 11th day of July, 1878, by the willful and unlawful killing, with malice aforethought, of one A. J. Shrum. The defendants demanded separate trials, and James Anthony, having been convicted, appeals to this Court from the judgment of conviction, as well as from the order of the Court below denying his motion for a new trial.

First. The first ground taken on this appeal is, that the verdict was contrary to law and the evidence. The theory of the prosecution was that Shrum was killed by Jesse Anthony, and that his brother James advised and encouraged the commission of the act. This brings the case within section 31 of the Penal Code.

We have examined the transcript very carefully, and cannot say that there was not sufficient evidence to justify the jury in finding the defendant guilty. The witness Brown testified to a confession made to him by James Anthony. The conversation detailed by the witness is quite lengthy, and in it this defendant expressed a desire that the crime might be

fastened upon one Albert Smith, and said to Brown: "If we could convict anybody it would do away with this d—d noise, and me and Jesse would be just as much thought of as we were before we did it." (Transcript folio 393.)

This confession, in connection with other circumstances tending to implicate the defendant, was sufficient to authorize a verdict of guilty; and we cannot undertake to say that the witness Brown was unworthy of credit, and that therefore his testimony should have been rejected by the jury. It is true that Brown was a hostile witness, and the evidence shows that he took a great interest in the prosecution; but these circumstances, and others found in the transcript, are not sufficient to justify this Court in holding that the conviction was contrary to the evidence, and that therefore the ruling of the Court below, denying defendant's motion for a new trial, was erroneous.

Second. The next point in the case that we will notice relates to the alleged misconduct of the juror Babcock. The evidence upon this question is conflicting, and the conclusion arrived at by the learned Judge who tried the case is supported by the statements of the juror and the evidence of the witness Cook. We cannot, therefore, say that there was error in holding, as the Court did, that there was not sufficient evidence of misconduct on the part of the juror to warrant the Court in disturbing the verdict.

Third. The third ground relied upon by defendant's counsel is, that a new trial should have been granted on the ground of newly discovered evidence. The newly discovered evidence appears to have been simply cumulative, or designed to contradict the witness Brown and others, and was not of such a character as entitles the defendant to a new trial.

Fourth. The fourth ground relied upon for a reversal of the judgment in this case is that the instruction given at the request of the prosecution was erroneous. The instruction complained of is as follows:

"There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony by an eye-witness of the commission of a crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant; threats previous to the commission of the crime tending to show hostility on his part against the deceased; and, in short, any acts, declarations, or circumstances

admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it any less reliable than the other class of evidence. A man may as well swear falsely to an absolute knowledge of the facts, as to a number of facts from which, if true, the facts on which the guilt or innocence depends must inevitably follow. No human testimony is superior to possible doubt, and all that is required if, under the foregoing rules, the testimony is sufficient to convince you, as reasonable men, beyond a reasonable doubt, that the defendant did commit the act charged, although the fact may be in a degree surrounded by a doubt, then I charge you it is your duty to convict."

We find no error in the foregoing instruction, and in our opinion it correctly states the rule relating to circumstantial evidence. But even if it were justly the subject of criticism, the following instructions given by the Court fully presented the law applicable to the case:

Third instruction: "When the evidence against the defendant is made up wholly of a chain of circumstances, and there is a reasonable doubt as to one of the facts essential to establish guilt, it is the duty of the jury to acquit."

Fifth instruction: "In order to convict the defendant upon the evidence of circumstances, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable, the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

The next point relied upon is that the Court erred in not sustaining defendant's objection to the testimony of Brown, in which he related a conversation between Jesse Anthony and himself. It is sufficient to say that the testimony admitted was immaterial, and did not in any manner tend to prejudice the defendant's case before the jury; and the same may be said of the testimony of the witness Davis. (Folio 422 of the transcript.)

Fifth. The fifth and last point is more serious. It may be remarked again that the defendant James Anthony was not near the scene of the homicide at the time Shrum was killed. Indeed, the evidence conclusively shows that he passed the night at a place fifteen miles distant from the point where the homicide was committed; and therefore it

devolved upon the prosecution to show, in the first instance, that defendant's brother Jesse was the guilty party immediately concerned in the killing, and that the act of killing was counseled, aided, and abetted by the defendant James. To prove this the prosecution attempted to show a conspiracy on the part of the two brothers to murder Shrum; and, as a part of such proof, statements made by Jesse tending to connect James with the commission of the act were introduced in evidence against the objection of the defendant. We refer more particularly to the evidence of the witness Lownes on this subject. He narrated a conversation which took place between Jesse and himself, in which Jesse, after referring to improper relations between the wife of Shrum and James Anthony, stated that "James laid in the slough, between the house and barn, to get a good shot at him (Shrum), but did not get a good chance, but that he would kill the d—d old son of a —— the first good chance he got."

The above evidence was admitted, it is fair to presume, upon the ground that there was sufficient evidence of a conspiracy between the two brothers to make the declarations of either admissible against the other. After a careful examination of the evidence in the case, we are not satisfied that the Court or jury was justified in finding that such a conspiracy was proven on the trial; but, conceding that it was, it by no means follows, as a conclusion of law, that the foregoing statement of Jesse was evidence against James. Mr. Best, in his work on Evidence (volume 2, section 508), thus states the rule: "When several persons are found to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party. * * * * * But what one of the party may have been heard to say at some other time as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy, cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offense. And, in general, proof of concert and connection must be given before evidence is admissible of the acts or declarations of any person not in the presence of the prisoner." And Mr. Greenleaf, speaking on the same subject, says: "The same principles apply to the acts and declarations of one of a company of *conspirators* in regard to the common design, as affecting his fellows. Here a foundation must first be laid, by proof sufficient in the opinion of the Judge, to establish *prima facie* the fact of conspiracy between the parties, or

proper to be laid before the jury, as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them." (1 Greenleaf on Evidence, sec. 3; see also Digest of the Law of Evidence, by Stephen, 6.)

Was the evidence objected to admissible under the rule established by the above authorities? In our opinion it was not. The evidence had no connection whatever with the question of a conspiracy, but simply related to a former separate and independent act of James, which bore no relation to, and had no connection with, a *concerted plan or common object.*

Judgment and order reversed.

We concur: McKinstry, J., Thornton, J., Sharpstein, J.

(Mr. Justice McKee and Mr. Justice Ross, not having heard the argument in this case, took no part in the decision.)

DEPARTMENT NO. 2.

[Filed April 17, 1880.]

[No. 6674.]

LAKE, RESPONDENT, vs. TEBBETTS, APPELLANT.

VENDOR'S LIEN—SALES SUBJECT TO MORTGAGE. Where lands are conveyed in consideration of one dollar, and subject to a certain mortgage previously executed by the vendor, the failure of the vendee to pay the mortgage does not entitle the vendor to a lien for the amount of the mortgage, if it appears that the entire amount of the mortgage, principal, interest, and costs was satisfied by a foreclosure sale.

Appeal from the District Court of the First Judicial District, Santa Barbara County.

Charles E. Huse, for respondent.

A. Packard and *Cowles & Drown*, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The plaintiff in this action seeks to foreclose a vendor's lien upon certain real estate described in the complaint. The facts found by the Court below are substantially as follows:

The plaintiff, being the owner of the premises, in consideration of one dollar conveyed them to the defendant, sub-

ject to two certain mortgages previously executed by the plaintiff to Milo Sawyer and R. C. Brown respectively. The mortgage to Sawyer was paid by the defendant; but the mortgage to Brown was by him assigned to one Ashley, who foreclosed it, and bought the premises covered by it at the foreclosure sale for the full amount due under the decree for principal, interest, costs, and expenses of sale.

It is insisted on behalf of the plaintiff that the defendant was bound to pay the mortgages above mentioned as part of the purchase money of the premises conveyed to her; and that as she did not pay the Brown mortgage, but suffered it to be foreclosed and the premises to be sold under the decree of foreclosure for the satisfaction of the principal, interest, costs, etc., due upon it, that the failure to pay said mortgage was a failure to pay an amount of purchase money equal to the amount of money secured to be paid by the mortgage. The theory of the plaintiff, as we understand it, is, that if the mortgage had been paid at maturity the plaintiff would have had no claim or lien for any purchase money; but not being paid at maturity, she has such a lien, although the mortgage has been satisfied by the sale of the land covered by it. We are unable to discover any ground upon which that theory can be supported. The conveyance was taken subject to the mortgages, and the plaintiff was paid the stipulated consideration for what she conveyed. If she had been compelled to pay any part of the sums secured by the mortgages by reason of the premises not selling for enough at the foreclosure sale to satisfy them, then a question of the liability of the defendant to reimburse the plaintiff for any sum or sums so paid might arise. But the mortgages have both been satisfied without recourse to the plaintiff, and it is impossible for us to perceive any basis for a claim by her against the defendant for unpaid purchase money. And if there is nothing due to the plaintiff on account of her sale of the premises to the defendant, there is of course nothing to support the claim of a vendor's lien.

The Court below, however, adopted the plaintiff's theory, and decreed that the premises which had been sold to satisfy the Brown mortgage be again sold to satisfy the plaintiff's lien for the purchase money. But upon the facts found we are satisfied that the Court erred in its conclusions of law.

Therefore the judgment and order denying the motion for a new trial are reversed, with directions to the Superior Court of the county of Santa Barbara to enter judgment upon the findings in this action in favor of the defendant.

We concur: Morrison, C. J., Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed March 26, 1880.]

[No. 6456.]

LANGLEY, RESPONDENT, vs. VOLL, APPELLANT.

WRIT OF ASSISTANCE—WHEN IT WILL NOT ISSUE. Where the purchaser at a sheriff's sale is a stranger to the record, the writ of assistance to put him into possession will not run in his name, nor in the name of *his grantee*.

IDEM. If on an application for a writ of assistance by the grantee of a purchaser at sheriff's sale it appears that the purchaser has permitted parties to remain in possession under contracts of sale, the Court will not undertake to settle the rights of the parties, nor grant the writ.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco County.

R. C. Harrison, for respondent.
Geo. Turner and *John Wade*, for appellant.

McKEE, J., delivered the opinion of the Court:

This is an appeal from an order made on December 9, 1878, for the issuance of a writ of assistance to put the appellants out of, and one William Hale into, possession of certain premises which he purchased from one Robert Hamilton, a purchaser at sheriff's sale under a decree of foreclosure rendered on the 17th day of April, 1873, in favor of one *G. A. Langley* vs. *F. W. Voll and wife*, the appellants herein.

The applicant, Hale, moved for the writ within five years from the date of the entry of the judgment; so that the question whether his right to a writ—assuming that as a stranger to the record he is entitled to one at all—is barred by the limitation of five years within which a plaintiff may take out process to enforce his judgment, does not arise in the case. But as the grantee of a purchaser at the sheriff's sale under a decree of foreclosure, who was himself a stranger to the record, we think he is not entitled to a writ of assistance, because he is an entire stranger to the record, and the process, if issued, could not run in his name. The case does not belong to the class of cases in which the plaintiff in a judgment purchases at his own sale. In such cases it has been held that the plaintiff, as a purchaser, is entitled to a writ of assistance to give effect to his judgment. (*Montgomery* vs. *Middlemis*, 21 Cal. 103.) But where the purchaser is a stranger to the record, the writ will not run in his name,

nor in the name of any of his grantees, immediate or remote. (*People* vs. *Grant*, 45 Cal. 97.) In *Wilson* vs. *Polk*, 13 Smede and Marsh, 131, it was held that a purchaser of land at a commissioner's sale, under a decree of a court of chancery, was not entitled to such a writ. In that case the purchaser applied to the chancery court for a writ. His application was denied, and he appealed to the Supreme Court. That Court denied his appeal upon the ground that it was not taken by a party to the suit. (See also *People* vs. *Grant*, *supra*.) And, says the Court, the same may be said of the application for the writ.

It is laid down in 2d Smith's Chancery Practice, 244, that the writ of assistance cannot regularly be issued at the instance of one not a party to the cause. The purchaser can only proceed by getting the vendor to make application for the process. Besides, if the applicant *was* a proper party, he is not intitled to the writ in this case; for the record shows clearly that the appellants have been in the possession of the premises for more than five years since the decree of foreclosure, claiming to have been rightfully in under two alleged contracts of sale made between one Hirshberg, for their benefit, and Hamilton the grantee of the Sheriff. One of these contracts was made in 1875, and the other in 1877; and upon them Mrs. Voll has paid to Hamilton $1,040 and the interest as it became due, and all the taxes, assessments, and charges upon the property, and has also expended $3,500 in improving it. Hamilton does not deny the existence of the contracts between Hirshberg and himself, nor the receipt of the money upon them; he denies only that he knew that the contracts were made for the benefit of Mrs. Voll. But he has permitted the Volls to remain in the undisturbed possession of the premises, with the full knowledge on his part that they were claiming them and expending their money in improving them. Under such circumstances, ignorance of some confidential relation existing between them and Hirshberg will hardly be imputed to him. But, however that may be, the Court, on an application by his grantee for a writ of assistance, will not undertake to settle the legal or equitable rights of the parties. These are matters which ought to be adjudicated in a regular suit; they should not be determined upon affidavits taken in a collateral proceeding. It is evident that the appellants have some rights under the contracts of sale, and great injustice might be done them were they to be turned out of possession before those rights have been adjudicated. (*Henderson* vs. *Tucker*, 45 Cal. 647.)

In the *City of San Jose* vs. *Fulton*, where it appeared on

a motion to set aside a writ of assistance that a purchaser at a sheriff's sale, after he had obtained his deed from the sheriff, parted with it, or agreed to part with it, to one in possession of the premises, the Supreme Court says: "It is clear that a writ of assistance should not have been issued to disturb the party in possession; nor should the writ have issued if it appeared that a question of this character, though controverted in point of fact, was pending between the parties." (45 Cal. 318.)

Order reversed.

We concur: McKinstry, J., Ross, J.

DEPARTMENT NO. 1.

[Filed March 31, 1880.

[No. 6141.]

LA SOCIETÉ FRANCAISE D'ÉPARGNES ET DE PREVOYANCE MUTUELLE ET AL., RESPONDENTS,

VS.

ELIAS L. BEARD ET AL., APPELLANTS.

EVIDENCE—SUBSTANTIAL CONFLICT. Where there is a substantial conflict in the evidence, the judgment of the lower Court will not be disturbed. So where the acknowledgement of a mortgage is proved *prima facie* by the notary's certificate, unless the effect of this presumption is so far removed as that such presumption does not create a substantial conflict in the evidence, the judgment will not be reversed.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

Garber & Thornton and *J. A. Stanley*, for respondents.

A. M. Crane and *W. H. Patterson*, for appellants.

MCKINSTRY, J., delivered the opinion of the Court:

The Court below found that the defendant Jane M. Beard *signed* the two mortgages set forth in the pleadings and mentioned in the findings "of her own free will, and with full knowledge of the terms and conditions thereof, and well knowing what the contents thereof were, and that the *certificates of said notary of the acknowledgment of mortgages are not, nor is either of them, in any respect untrue.*"

The certificate of the notary attached to the mortgage, referred to as the $175,000 mortgage, is in the words and figures following:

"STATE OF CALIFORNIA, }
"City and County of San Francisco. } ss.

"On the 19th day of June, 1872, before me, F. J. Thibault, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Henry G. Ellsworth, Elias L. Beard, and Jane M. Beard, his wife, whose names are subscribed to the annexed instrument as parties thereto, severally personally known to me to be the same persons described in, and who executed the said instrument; and they severally duly acknowledged to me that they executed the same freely and voluntarily, and for the uses and purposes therein mentioned. And the same Jane M. Beard, wife of said Elias L. Beard, having been by me first made acquainted with the contents of such instrument, duly acknowledged to me, on an examination separately and apart from and without the hearing of her husband, that she executed the same freely and voluntarily, for the uses and purposes therein mentioned, without fear, compulsion, or undue influence of her husband, and that she does not wish to retract the execution of the same.

"In witness whereof, I have hereunto set my hand and affixed my official seal at my office, in the city and county of San Francisco, the day and year last above written.

"[Seal.] F. J. THIBAULT,
"Notary Public."

In the view we take of this case, it is not necessary to decide whether the notary's certificate can properly be attacked under the pleadings herein. We shall assume that its recitals may be disputed.

It is said by counsel for the appellants that the certificate is not true, in so far as it states that "the said Jane M. Beard, wife of said Elias L. Beard, *having been by me first made acquainted with the contents of such instrument*, duly acknowledged," etc.

When the acknowledgment was taken, the law did not require of the notary himself to make the married woman acquainted with the contents of the instrument, but only that she should "be made acquainted," etc. (Acts of 1850, p. 249.) There certainly was evidence that she had been made acquainted with the contents. Giving no weight to the circumstance that she *signed* the mortgage, she herself declares in her testimony that, in response to an inquiry of the notary, "I suppose you know the contents of this?" (the mortgage), she answered, "I think—I presume I do," or "I think I do," or something of that kind; "*I merely meant to say I had heard what it was*, but of course I could not say

that I *knew* it." This is evidence not only that she *said* she thought she knew the contents, but *tending* to prove that she had heard what the instrument was, and in fact *knew* its contents. The witness A. M. Crane testified: "Mr. Thibault took the mortgage in his hand, and asked Mrs. Beard, or said to her, 'I suppose you understand, Mrs. Beard, what this is?' She replied, 'Yes, I suppose I do; I understand it to be a mortgage on *our lands*,' or 'on the Mission lands;' I am not sure which expression she used. He then asked her the usual questions that are put to a *femme covert*—whether she executed freely and voluntarily, or wished to retract it." But for the circumstance that the mortgage created a lien upon her *separate property* she need not have executed or acknowledged it; and her statement, as recalled by Mr. Crane, certainly tended to prove that she was aware that her lands were included in the description of the instrument.

In the portion of the notarial certificate, "having been by me first made acquainted with the contents," the words "by me" are surplusage. It would have been enough if she had been made acquainted or become acquainted with them from any other source. (*Jansen* vs. *McCahill*, 22 Cal. 565.) But the notary *did* make her acquainted with the contents, if he recalled to her memory the information she had already received. It is admitted that the certificate is *prima facie* proof of the facts set forth in it. The Court below was therefore justified in finding that its recitals were true, unless the presumption of their truth was overcome by the evidence. The notary had died previous to the trial, and the only persons then living who were present when the acknowledgment was taken (while both admitted that the attention of the party was called to her knowledge of the contents of the instrument) *differed* in respect to the form of the inquiry put by the officer, and as to the form and substance of the defendant's reply. In this condition of the evidence there was at least a substantial conflict with respect to the truth or falsity of the recitals in the certificate; and wherever such conflict has appeared, we have uniformly declined to interfere with the findings of the Court below. There is no pretense but that defendant was acquainted *in part* with the contents of the instrument, and that her mind was directed to its contents by the question of the notary. After the lapse of time between the taking of the acknowledgment and the trial, and considering the inattention of the witnesses to the details of the transaction—for which we must give them credit if we would attribute *good faith*, at least to one of them—we cannot say that the Court below found against the

evidence in its conclusion that the certificate declared the truth. The contrary to the statement of the certificate should have been distinctly proven. Here, in addition to the presumption of an imperfect recollection, which lapse of time would suggest in respect to facts of which neither of the witnesses took special note—the one because she did not know the importance of the *formula*, and the other because, if he had noticed the omission, he would have prevented the payment of the money until the law had been complied with—we have the further circumstances that the two witnesses (both endeavoring to recall the truth) do not agree in their recollection.

In respect to the transaction of the acknowledgment of the $60,000 mortgage, much of what has been said will apply. The recollection of Mrs. Beard seems even more indefinite in reference to that acknowledgment than in respect to the $175,000 mortgage. The other witness, A. E. Crane, after proceeding with considerable prolixity to explain his relations to the defendants and the origin of their acquaintance, added: "She had western lands; she was talking to me about them; the idea ran in my head she was transferring some of those western lands—at least I didn't hear anything to change my mind but what it may have been some of those western lands; and there being no one in the office but herself, and with the mutual inquisitiveness existing, I am free to say that there was no paper read to give me any idea of what she was selling." To the question, "Was any explanation made?" witness replied, "I *cannot say;* I *do not recollect* any explanation." Being further pressed by the inquiry, "Could Thibault have made an explanation to her of the contents of any instrument there that you wouldn't have heard it?" the witness was quite confident that, although he might not recollect all the conversation she had with the notary, had there been any explanation about the contents of the paper he would have known it, and known what the transaction was about. The witness did not even remember what Mrs. Beard had stated—to-wit, that the notary said, as *she* remembered, "'I suppose you are acquainted,' and I said, 'I supposed I was,'" etc.

Giving all credit to the good faith of the defendant who testified, we cannot say that this testimony so far removed the effect of the presumption which the law attaches to the notarial certificate, as that such presumption did not create even a substantial conflict in the evidence.

Judgment and order affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT NO. 1.

[Filed March 29, 1880.]

[No. 6427.]

THOMAS M. QUACKENBUSH, RESPONDENT,

VS.

LEANDER SAWYER, APPELLANT.

PARTNERSHIP—WHAT DOES NOT CREATE—TRUSTEE. An agreement to divide the income of a business does not create a partnership; nor does the mere joint ownership in personal property. So, where circus property was transferred to two parties (the plaintiff and defendant herein) to secure an indebtedness for moneys advanced severally by them, and it was agreed that one of them (the defendant) should take possession of the property and transport it from place to place upon a performing tour, and to apply the receipts, first, to the payment of the money advanced by the other (the plaintiff), and then to the payment of himself, the receipts came to defendant's hands not as a partner, but as a trustee; and the plaintiff had the right to compel the defendant to account for so much as came to his hands for the purpose of discharging his trust.

ACCOUNTING. Such an agreement makes an account necessary to ascertain the respective rights of the parties.

VARIANCE. Where the variance between the agreement as set forth in the complaint, and that proved, is one which could not have misled or surprised the defendant to his prejudice in maintaining his defense upon the merits, it is not material.

Appeal from the District Court of the Twenty-third Judicial District, San Francisco County.

E. J. Pringle, for respondent.

A. W. Thompson, for appellant.

McKEE, J., delivered the opinion of the Court:

We do not regard the action in this case, as does counsel for the appellant, as an action for the settlement of a partnership account.

In substance, it is alleged in the complaint in the case that the parties had severally advanced certain sums of money in purchasing the "circus property" mentioned in the complaint; that they then entered into an agreement that the defendant should take and keep possession of the property, and cause it to be used and employed by circus companies or managers for the joint benefit of himself and the plaintiff in equal shares; that in using or employing it for this purpose, he should make provision that the "rent or compensation" receivable for the use of the property should be first paid to him, and that, upon collecting or receiving such "rent or compensation," he should account therefor, and pay it over every month to the plaintiff, until the money which plaintiff had advanced for the purchase of the property, and interest thereon from the time of its advancement, should be paid;

and after such payment defendant should account for and pay over to the plaintiff one half of said rent or compensation. And it is charged that the defendant received as "rent or compensation," for the use of the property, large sums of money, of the amount of which plaintiff is ignorant, and he prays for an accounting and division of the property.

Each allegation of the complaint is specifically denied by the answer, and a special defense is also set up. The proofs on the trial established these facts: That in June, 1873, one Conklin was owner of the "circus property" mentioned in the pleadings, and manager of a certain troupe or company of circus performers; that by a bill of sale Conklin transferred the property to the parties in this action, as security for the payment to them of certain sums of money which they had severally advanced to him. That they agreed with each other that defendant should take possession of the property, and transport it from place to place in the State of California upon a performing tour, and receive or collect the income of the performances, and apply it, first of all, to the payment of money advanced by the plaintiff, and then to the payment of what he himself had advanced to Conklin.

Pursuant to this agreement, defendant took possession of the property; and, being a teamster, made a contract with Conklin for the transportation of the property, during the summer season of 1873, from place to place in the State of California on a performing tour, under the direction of Conklin. Performances were given in various interior towns and cities of the State, at which the defendant collected or received $4,200; but he has failed and refused to account for or pay to the plaintiff any portion thereof. Under these proofs the Court below rendered judgment against the defendant for the amount of money advanced by the plaintiff to Conklin, and interest thereon from the date of its advancement.

The bill of sale to the parties made them joint owners of the property. (*Heyland* vs. *Badger*, 35 Cal. 404.) But a mere joint ownership in personal property does not constitute the owners partners. (*Post* vs. *Kimberly*, 9 Johns. 470; *Hawes* vs. *Tillinghast*, 1 Gray, 289.) Nor did the agreement between them have that effect. A partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them. (Section 2395 of the Civil Code.) But plaintiff and defendant were not engaged in the circus business, nor did they agree to carry it on. The business belonged to Conklin alone, and in it the defendant used the joint property of himself and the plaintiff—as he was authorized to use it in the

business of any other circus manager—upon the terms and conditions that *he* was to receive the income of the business from Conklin, for the payment of their claims against Conklin. Only to the extent of the income, or, as the pleader calls it, "rent or compensation," receivable by the defendant were they at all interested in the business. But an agreement to divide the income of a business does not create a partnership; therefore, when the defendant received the income he did not receive it as a partner, but as a trustee; and he held so much of it as was necessary to pay the plaintiff's demand against Conklin in trust for that purpose, and it was his duty to account for it to the plaintiff. Failing in *that*, the plaintiff had a right to compel him to account for so much of it as came into his hands for the purpose of discharging his trust.

The character of the agreement between them, as set forth in the complaint, and that proved at the trial, made an account necessary to determine the respective rights of the parties. (*Gur* vs. *Redman*, 6 Cal. 576.) And while there is some difference between the agreement, as stated in the complaint, and that proven at the trial, yet the variance is not material. It is one which could not have misled or surprised the defendant to his prejudice in maintaining his defense upon the merits. (Section 469 Code Civil Procedure; *Peter* vs. *Foss*, 20 Cal. 590; *Regan* vs. *O'Reilly*, 32 Ind. 14; *Woolcot* vs. *Meach*, 22 Barb. 321.)

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed April 7, 1880.]

[No. 5807.]

DIGGINS, RESPONDENT, vs. REAY, APPELLANT.

STREET ASSESSMENT—NECESSARY PARTIES. In an action to enforce a street assessment, all the parties alleged to be owners must be properly served and brought before the Court. A decree enforcing the lien in the absence of one of the parties in interest is a nullity.

Appeal from the District Court of the Third Judicial District, San Francisco County.

J. M. Wood, for respondent.

J. M. Seawell, for appellant.

THORNTON, J., delivered the opinion of the Court:

This is an action to enforce a street assessment. The appeal is prosecuted by the defendants from the judgment.

The action was brought against Joseph W. Reay and

Joseph Reay, who, with several other persons named as defendants, were alleged to have been at the time the assessment was made, and still continued to be when the action was commenced, the owners in fee of the lot of land assessed. It does not appear from the transcript which contains the judgment roll that Joseph Reay was ever served with summons, or appeared in the case in person or by attorney. Neither does it appear from the record that any disposition of the case was made as to Joseph Reay. The judgment is against the other defendants. Joseph Reay's name is not mentioned in it.

It is contended on behalf of the appellants that the judgment should be reversed, because the case has not been disposed of as to the person above mentioned. We think the point is well taken.

Further, it is held in *Hancock* vs. *Bowman*, 49 Cal. 413, which was an action to enforce a street assessment, that the statute gives no authority for a decree enforcing the lien in the absence of one of the parties in interest. The statute under which the lien herein is alleged to exist is the same as to parties as that construed in *Hancock* vs. *Bowman*.

Joseph Reay is alleged here to be one of the parties who owned the land on which the assessment was levied; and in accordance with the rule as declared in *Hancock* vs. *Bowman*, he should have been served with summons and brought before the Court as a party.

There is no other error in the record; but the foregoing considerations bring us to the conclusion that the judgment must be reversed. So ordered.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT NO. 1.

[Filed March 31, 1880.]

[No. 6475.]

FITZGERALD, RESPONDENT,

vs.

THE UNION INSURANCE CO., APPELLANT.

Appeal from the District Court of the Third Judicial District, Alameda County.

Thos. P. Ryan and *Jas. C. Martin*, for respondent.

Sidney V. Smith & Son, for appellant.

By the Court:

There was a substantial conflict in the evidence.

Judgment affirmed.

Pacific Coast Law Journal.

VOL. V. MAY 8, 1880. No. 11.

Current Topics.

ON the 5th instant WILLIAM P. DAINGERFIELD, Presiding Judge of the Superior Court of this city and county, died while in the trial of a cause. The deceased was a pure, upright, and conscientious man; an able jurist and exemplary citizen. The bar does not mourn alone, for the whole community feels the loss deeply.

JUDGE HOFFMAN, of the United States District Court, has held in a very recent case *(Lloyd, Assignee,* vs. *Foley)* .that an assignee in bankruptcy cannot maintain an action for the benefit of general creditors, against a vendee of the bankrupt, to declare the sale of chattels fraudulent and void because the sale was not accompanied by an actual and immediate delivery and change of possession, as required by the State statute. He says in the opinion that under a recent decision of the Supreme Court of the United States, such inquiry is immaterial, as the assignee can assert in behalf of the general creditors no claims which the bankrupt himself could not have asserted in a contest exclusively between him and his vendee.

IN *Hill* vs. *Finnigan (vide* page 301), our Supreme Court makes a very important ruling. It is held that when an appellant filed in the Court below undertakings on appeal, in form complying with and executed as required by sections 941 and 942 of the Code of Civil Procedure, and the sureties failed to justify after being excepted to, sufficient undertakings may be filed in the Appellate Court when there is nothing to indicate that the failure to justify was the result of other causes than inadvertence; and the Court has power to make an order to operate as a *supersedeas.*

Supreme Court of California.

IN BANK.

[Filed April 8, 1880.]

[No. 10,486.]

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT,

vs.

LEE FAT, APPELLANT.

CRIMINAL LAW—PERJURY—EVIDENCE. Where the defendant made oath to a complaint of assault to murder, and then testified at the preliminary trial that the person so charged was not guilty, and said defendant was indicted for perjury, the complaint made by the defendant is admissible to show the pendency of that case, as it laid the foundation for the preliminary examination in the case in which the perjury was committed.

EVIDENCE—REPORTER'S NOTES—INTERPRETER. The phonographic reporter's notes of the testimony of the defendant taken in the case in which the perjury is charged to have been committed, and taken through an interpreter, cannot be read in evidence on the trial of the defendant for perjury.

Appeal from the District Court, San Joaquin County.

Attorney-General, for respondent.

A. W. Roysdon and *G. E. McStay*, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

The defendant was indicted, tried, and convicted in the County Court of San Joaquin County of the crime of perjury.

The indictment charges that, upon an examination of one Ah Sing before the Police Judge of the city of Stockton, the defendant was sworn as a witness, and thereupon testified to a material fact as true which he well knew to be false.

It appears from the transcript that the defendant made a complaint before the Police Judge of the city of Stockton, charging that Ah Sing committed an assault upon him (the defendant) with intent to commit murder, and thereupon said Police Judge issued a warrant for the arrest of Ah Sing; that an examination of said Ah Sing upon said charge was had before said Police Judge, and on said examination the defendant, being called as a witness on behalf of the prosecution, testified that he did not know Ah Sing, and that Ah Sing was not guilty of the crime with which he was charged. The defendant Lee Fat was convicted of the crime of perjury, and sentenced to ten years' imprisonment in the State Prison. From the judgment of conviction he has taken this appeal.

On the trial in the Court below the prosecution offered in

evidence the complaint made by the defendant, charging Ah Sing with the assault. To the introduction of this evidence the defendant by his counsel objected, and the objection being overruled by the Court an exception was duly taken. The object of the prosecution was doubtless to show the pendency of the case *(The People* vs. *Ah Sing)* in the Police Court, and it was certainly admissible for that purpose. The complaint laid the foundation for the preliminary examination of the case in which the perjury was charged to have been committed. The learned counsel for the defendant treats the complaint as being the proceeding upon which the perjury is predicated, but such is not the fact. The theory of the prosecution is that the complaint was true, and that in making the complaint the defendant simply swore to the truth. It charges Ah Sing with the crime of assault with intent to commit murder, and the evidence for the prosecution on the trial of the defendant upon the charge of perjury was directed to the proof of that charge. But on the preliminary examination the defendant testified that Ah Sing was *not guilty*—that he was not the person who committed the assault upon him; and it is for so testifying that he was indicted, tried, and convicted. The case, therefore, clearly comes within section 118 of the Penal Code, which provides that "every person who, having taken an oath that he will testify, etc., truly before any competent tribunal, etc., in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath states as true any material matter which he knows to be false, is guilty of perjury."

The examination was being regularly conducted before a court of competent jurisdiction; the matter testified to was material to the question before the Court, and an oath which was willfully false constituted the crime of perjury.

First. The objection to the introduction of the complaint, that it did not appear that it (the complaint) was made by the defendant, is not sustained by the evidence; but, on the contrary, it appears, with sufficient certainty, that the defendant was the party who made the complaint. Other objections in this connection are not well taken.

Second. The next exception was to the ruling of the Court, allowing the prosecution to read on the trial the notes of the phonographic reporter. On the preliminary examination before the Police Judge, the testimony of the defendant was taken down by one Hood, the official short-hand reporter of the County Court of San Joaquin County; and his notes written out in long hand were read in evidence on the trial

in said Court, for the purpose of proving what defendant swore to on such preliminary examination before the Police Court.

By an Act of the Legislature, approved March 26, 1872 (Laws of 1871–2, page 551), the Judge of the County Court of San Joaquin County was authorized to appoint a phonographic reporter; and by section 1 of said Act it is provided that such reporter shall, at the request of the District Attorney, appear before the Coroner at any inquest, or before any committing magistrate, in cases of felony, and take down in short hand the evidence given at such inquest or any preliminary examination for felony; and section 2 of said Act provides that the notes of the said reporter shall be taken as *prima facie* evidence of the testimony given upon any trial when such notes are taken.

It is claimed, however, that such notes were not evidence in this particular case, because the evidence given by Lee Fat on the preliminary examination was taken through an interpreter, and therefore the reporter's notes are merely *hearsay evidence*.

In support of the ruling of the Court below, the Attorney-General has cited the authority of Mr. Wharton on Evidence, Volume I, section 174, and the language there used is as follows:

"Mr. Bentham has observed that, to constitute hearsay testimony, it must be separated by the interposition of some appreciable time from its reception from the party from whom it is obtained. A, a witness in court, for instance, speaks in so low a tone that what he says has to be repeated to the judge; or a foreigner, when examined, has to be interpreted by an interpreter. In this case the transmission of the witness' evidence is instantaneous, though through the medium of another person, and it is sometimes argued that because such evidence is instantaneous it is not hearsay. But a sounder reason for the distinction is, that in cases of repetition or interpretation the inaudible or foreign witness is examined in court, and is therefore responsible; whereas the extra-judicial witness, whose utterances are reported by another, is not examined in court, and is therefore not responsible."

In support of the text, the learned writer refers to several authorities, all of which we have examined, but none of which fully sustain him. The first case is that of *Swift* vs. *Appleton*, 23 Mich. 253, in which it was simply held that the next friend of an infant plaintiff might act as an interpreter on the trial. The next case is that of *The People* vs. *Ah Wee*,

48 Cal. 236, where the Court holds "that a conversation between a person indicted for murder and his victim while alive, held partly in Chinese and partly in English, may be proved—that part of it held in English by persons present who understood English only, and that part of it held in Chinese by persons present who understood Chinese; provided that both the accused and his victim understood both languages." The third and last case referred to by Mr. Wharton is that of *Schearer* vs. *Harber*, 36 Ind. 536, where it is held that "evidence of what an interpreter testified as received by him in a foreign language from a witness on a former trial cannot be given by one who heard the evidence, unless the interpreter be dead or insane, out of the jurisdiction, or sick, or unable to testify, or, having been summoned, appears to have been kept away by the adverse party." The Court further says: "The interpreter in the trial of the cause before the justice, we may assume, was duly sworn, because the law required that he should be sworn. He translated what the appellant testified to in the German language into English, and in the latter language delivered it to the justice and the jury. To this extent the interpreter was a witness, and the case falls clearly within the rule that regulates the introduction of what a witness testified to on a former trial, which is as above stated." (1 Greenleaf on Evidence, sec. 162.)

It will thus be seen that no one of the cases cited by Mr. Wharton sustains the rule as broadly as stated by him in his work on Evidence.

In the case of *The State* vs. *Thomas*, 64 N. C. 74, the learned Chief Justice, delivering the opinion of the Court, says: "It is a cherished rule of the common law that in trials by jury the witnesses shall be openly examined and cross-examined in the presence of the parties and of the jury. An exception is made in regard to dying declarations, but the exception is restricted to indictments for homicide against the party who caused the death. A relaxation of the rule is also made, so as to admit in evidence what a witness who is dead swore to on a former trial before a jury or a committing magistrate, upon the ground that the accused had the benefit of confronting the witness and of cross-examination, and is only deprived of one test of truth—the presence of the witness before the jury—which loss was caused by the act of God." (*State* vs. *Valentine*, 7 Iredell, 225.)

We have found no case which sanctions the admission of the evidence which was received in this case, and are of opinion that the reporter's notes were not competent evidence

against the defendant. Neither the interpreter nor the reporter was offered as a witness, nor was their absence accounted for; and it was the right and privilege of the accused to confront and cross-examine the witnesses in the case. (Art. I, sec. 8, Constitution of Cal. 1849; Art. I, sec. 13, Constitution of Cal. 1879; Constitution of the U. S., Art. XIV, sec. 1; *Hoke* vs. *Henderson*, 4 Dev. N. C. 1; *Wynehamer* vs. *People*, 13 N. Y. 445–6.)

In our opinion the interpreter or some other witness to the facts should have been called, on the part of the prosecution, to prove what the defendant swore to on the preliminary examination. The defendant would then have had the privilege of cross-examination, which was denied him on the trial of this case.

Judgment and order reversed.

We concur: McKinstry, J., Sharpstein, J., Ross, J., McKee, J., Thornton, J.

DEPARTMENT NO. 2.

[Filed April 7, 1880.]

[No. 6199.]

IN THE MATTER OF THE ESTATE OF MARY ISABELLA TOOMES, DECEASED.

WILLS—UNSOUND MIND—EXPERTS. A Roman Catholic priest, regularly educated and officiating as such, and daily required to exercise and pass his judgment upon the mental condition of invalids or dying persons that he might administer the sacrament only to those whose mind was in a proper state to reason or act of its own volition, is an expert as to the sanity of a person within the meaning of section 1870 of the Code of Civil Procedure.

IDEM—INSANITY—PROOF OF. Proof of insanity, not only at the time the act was done, but both before and subsequent thereto, is admissible.

IDEM—EVIDENCE. The *exclusion* of proper evidence is ground of reversal.

IDEM—EXECUTION OF WILL. Where a testatrix made her mark to the instrument, and declared it to be her will and testament in the presence of witnesses, and the witnesses subscribed the same in her presence and in the presence of each other, it is a sufficient execution.

IDEM—WITNESS TO WILL. It is not necessary for the witness who signs the name of the testatrix to do more than sign his own name as a witness.

Appeal from the Probate Court of Alameda County.

A. Packard and *Edmonds & Reynolds*, for appellant.

H. A. Lake and *J. Chadbourne*, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

On the first day of August, 1877, a petition was filed in the Probate Court of the county of Alameda, by certain persons therein named, for the revocation of the probate of the will

of Mary Isabella Toomes, deceased, and for the cancellation of letters testamentary granted by said Court upon such probate to one John S. Butler. The grounds set forth in said petition are: "First, that said will was a forged instrument; second, that the said Mary Isabella Toomes was not, at the date of said pretended will, of sound disposing mind or memory, nor free from undue influence, but, on the contrary, was of unsound mind, and incompetent, by reason thereof, to make a will; and further, that if said alleged will was ever made by her, she never understood its contents, but was imposed upon and deceived, and that she executed the same under fear and undue influence; and thirdly, that said purported will was never subscribed by said Mary Isabella Toomes herself in any manner, by mark or otherwise, nor was her name ever subscribed thereto in any manner, by mark or otherwise, in her presence or by her direction, by any person, nor did any person write his name to said purported will as an attesting witness to her mark, or to her signature by mark."

To this petition an answer was duly filed containing a specific denial of all the material allegations contained in the petition; and the case having been duly heard and considered by the said Probate Court of Alameda County, a decree of said Court was entered therein on the 26th day of June, 1878, denying the application of the contestants, and ratifying, approving, and confirming the probate of the said will of the said Mary Isabella Toomes, and adjudging the said will to be in all respects legal and valid. In proper time, petitioners filed their bill of exceptions, and now bring the action of the Probate Court before this Court for review.

On the trial in the Court below, one Lawrence Serda was called as a witness on behalf of contestants, who, on his examination in chief, testified as follows: "I called there alone about 3 o'clock the day previous to her death; afterwards told Father Lagan. I went into the room and inquired about the state of her health. She didn't give me any answer; in fact, she didn't seem to take much notice of me at all. I remained there a few minutes. In the same room there was a lady; she was afterwards introduced to me as Mrs. Butler. As I could not get a proper answer from the old lady, I requested Mrs. Butler to move out of the room, which she did very kindly, and then I asked the old lady the questions preparing her for her confession. At first I spoke to her in Spanish, but she gave me an answer in English. I do not rember what her answers were."

Question by contestants: "Were her answers responsive

to your questions?" Objected to by proponents. Objection sustained, and exception taken by contestants.

Witness was then further interrogated, and testified as follows: "I was regularly educated for the priesthood at a university in Spain, and have officiated as a priest for the past ten years. That one of the objects of the preparatory education of a priest, as he was taught, was to make him competent to pass upon the mental condition of a communicant. That for that purpose, to a limited extent, physiology and psychology were branches of his studies. That previous to officiating as a priest, it was requisite that he should be skilled in determining the mental condition of those who sought the sacraments. That in every case of the administration of the rites of his church to invalids or dying persons, it was necessary for the priest to make an examination of the mental condition of the recipient, to ascertain if his mind was in a proper state to reason or act of its own volition. That the sacrament could only be administered after such a preliminary examination. That therefore, as a priest, he was daily required to exercise and pass his judgment on the mental condition of persons."

Question by contestants: "State the mental condition of Mrs. Toomes as she appeared to you during this visit?"

Question objected to on the ground that "the witness had not been shown to be an expert." The Court sustained the objection, and the contestants excepted to the ruling of the Court.

It is claimed on behalf of appellants that this was error. Section 1870 of the Code of Civil Procedure reads as follows:

"In conformity with the preceding provision, evidence may be given upon a trial of the following facts:

"Subdivision 9. The opinion of a witness respecting the identity or handwriting of a person, when he has knowledge of the person or handwriting; *his opinion on a question of science, art, or trade, when he is skilled therein.*"

"On questions of science, skill, or trade, or others of the like kind, persons of skill, sometimes called *experts*, may not only testify to facts, but are permitted to give their opinions in evidence. Thus the opinions of medical men are constantly admitted as to the cause of disease, or of death, or the consequences of wounds, and as to the sane or insane state of a person's mind as collected from a number of circumstances, and as to other subjects of professional skill; and such opinions are admissible as evidence, though the witness founds them not on his personal observation, but on the case itself, as proved by other witnesses on the trial." (1 Greenleaf on Ev., sec. 440.)

The principle is thus stated by another writer on the law of evidence: "The opinions of witnesses possessing peculiar skill are admissible wherever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it." (2 Best on Evidence, sec. 513.)

It will thus be seen that the provision of the Code permitting a witness to give his opinion on a question of science, art, or trade, when skilled therein, is but a legislative enactment of a well-settled rule of evidence at common law; and the inquiry here is, whether it sufficiently appears that the witness Serda was an expert upon the question of mental disease, generally termed insanity.

It has been a question with the courts whether the rule upon this subject was limited to the opinions of experts, and in a very late and elaborate case before the Supreme Court of New Hampshire it was held that it was not so limited. "Non-professional witnesses, who are not subscribing witnesses to a will, may testify to their opinions in regard to the sanity of a testator, when founded upon their knowledge and observation of the testator's appearance and conduct." (*Hardy* vs. *Merrill*, 56 N. H. 227.) And Mr. Redfield, in his work on Wills seems to adopt the rule laid down in the New Hampshire case as correct. The following is his language: "The learned judge shows very conclusively, both upon authority and reason, that the opinion of the unprofessional witness in such a case is commonly far more reliable as a basis of ultimate decision on questions of sanity and mental capacity, than any specific facts which could possibly be gathered from the witnesses. * * * The tendency of American courts in the last few years has been largely in the direction contended for by the learned judge; and there seems to be no question that it must ultimately prevail all but universally. We should rejoice at a such result as greatly tending towards the establishment of truth, with greater facility and certainty in a very important class of cases." (1 Redfield on Wills, 4th ed. 1876, 138, 145; *DeWitt* vs. *Barly and Shoemaker*, 17 N. Y. 340.)

It is not necessary for us, however, to pass upon the question of the admissibility of such evidence in this case. The witness Serda, it is claimed, *was an expert;* and it is upon the ground that he was an expert that the alleged error in the ruling of the Court below is predicated. The inquiry then is,

What is an expert? "Experts, it has been said, are persons instructed by experience." (Best on Evidence, vol.—, p. 368.) Webster's definition is, "taught by use, practice, or experience." Worcester says an expert "is a person having skill, experience, or peculiar knowledge on certain subjects or in certain professions—a scientific witness." The following definition is given by Bouvier: "Experts—witnesses who are admitted to testify from a peculiar knowledge of some art or science, a knowledge of which is requisite or of value in settling the point at issue; persons conversant with the subject matter on questions of science, skill, trade, and others of like kind."

In the case of *Fairchild et al.* vs. *Bascomb et al.*, 35 Vermont, 408, the Court says: "Persons who are much accustomed to attend upon the sick, to watch the progress of diseases to their end, and to be with the dying, are by their experience enabled to form a better judgment as to the course of disease and its probable effect upon the body and mind in the last hours of life than others who have no such opportunity. Physicians who are in general practice and nurses thus become experts in such matters, so far as observation and experience can furnish knowledge."

"One who is not engaged in the practice of physic may nevertheless be competent to testify, if he shows that he had studied the science of medicine and felt competent to express a medical opinion upon a particular disease. The fact that he was not a practicing physician would go to his credit." (*Tullis* vs. *Kidd*, 12 Ala. 648.) "It has been decided often that medical experts may express a direct opinion upon the sanity of the testator when they have had an opportunity to form such opinion from personal examination and acquaintance." (Redfield on the Law of Wills, vol. 1, pp. 154–5.)

The foregoing citations are sufficient to establish the general rule on the subject of "expert" testimony; and now let us apply the rule to the facts of this case.

Was the witness Serda an expert on the question of insanity? Was he skilled in the science of mental diseases? A reference to his evidence will answer these questions. He says he was regularly educated in a college of Spain, and had officiated as a priest for ten years; that it was a part of his preparatory education to become competent to pass upon the mental condition of communicants in his church, and for that purpose physiology and psychology were branches of his studies; "that previous to his officiating as a priest, it was requisite that he should be skilled in determining the mental condition of those who sought the sacraments; that

in every case of the administration of the rites of his church to invalids or dying persons it was necessary for the priest to make an examination of the mental condition of the recipient, to ascertain if his mind was in a proper state to reason or act of its own volition; that the sacraments could only be be administered after such a preliminary examination; and that therefore, as a priest, *he was daily required to exercise and pass his judgment on the mental condition of persons.*"

It has been shown by the authorities already referred to that physicians in general practice who have never made a specialty of the subject of insanity, as well as physicans who are not engaged in the practice of their profession, and also nurses, are deemed experts on this subject; and on what principle or for what reason could the witness Serda be held not to be an expert? It was a part of his collegiate education, and it was specially a matter of daily practice with him for ten years to familiarize himself with the mental condition of persons upon whom he was called on to attend in his character as a priest; and it does seem to us that, from both education and experience, he was peculiarly qualified to express an opinion as an expert on the question of mental disease.

The objection that the inquiry invaded the secrecy of the confessional is not, in our opinion, well taken. It is not pretended that the testatrix ever made a confession, and the matter upon which the witness was interrogated did not come within the letter or spirit of section 1881 of the Code of Civil Procedure. "A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs." The above is the prohibition found in the Code. The examination of the priest was confined to facts which were brought to his knowledge on a preliminary examination, and with a view to learn whether Mrs. Toomes was in a proper condition of mind to make a confession, and nothing more. But it is claimed that the testimony was inadmissible because the excluded proof relates entirely to the condition of Mrs. Toomes at a period subsequent to the execution of the will. The learned counsel for respondent has cited several authorities for the purpose of showing that proof of insanity at a given time raises no presumption of insanity prior thereto. We understand the rule to be, however, that proof of insanity, not only at the time the act was done, but both before and subsequent thereto, is admissible. (1 Redfield on Wills, 156–157; *Kinne* vs. *Kinne*, 9 Conn.

104; *McAllister* vs. *The State*, 17 Alabama, 436; *Peasley* vs. *Robbins*, 3 Metcalf, 164; *McLane* vs. *The State*, 16 Ala. 672.)

It is further claimed that the admission of the rejected evidence would not have changed the result; *therefore* no injury has been done the appellants by the ruling of the judge excluding the evidence of the witness Serda. In *Spanagle* vs. *Dellinger*, 38 Cal. 278, it was held that a new trial should be granted because incompetent evidence was admitted, although the judge who tried the case held, in denying a motion for a new trial, that his decision would have been the same if the evidence had not come in; and in the case of *Sweeney* vs. *Riley*, 42 Cal. 402, the case of *Spanagle* vs. *Dellinger* was referred to in terms of approval, and it was there said that "injury will be presumed from error, where we cannot see from the record that none has been done." But whatever the rule may be upon this point, when improper evidence has been admitted not changing the result, it seems to be well settled that *the exclusion* of proper evidence is ground of reversal. In the case of *Arthurs et al.* vs. *Hart*, the Supreme Court of the United States says: "The case of the refusal of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable in case the evidence had been admitted. * * * We think, therefore, that the improper rejection of testimony on the trial before the judge, where the jury has been dispensed with, should constitute the subject of review on the writ of error, as in the case of a trial before a jury." (See 17 How. U. S. 6.)

The rejection of the evidence of the witness Serda was error, for which the judgment must be reversed. But there are two other questions in the case upon which it may be proper for us to pass.

The objections to the will made by contestants, on the ground that the same was not executed and attested as required by the provisions of the Civil Code, are not well taken. In the first place, it is claimed by contestants that the subscription was not made in the presence of the attesting witnesses, and that the testatrix did not acknowledge before them that the will was made by her authority. We are of the opinion that the evidence in the case was sufficient to justify the Court below in holding that the will was executed in accordance with section 1276 of the Civil Code. The witness Leake, by whom the will was written, testified

as follows: "I said to her, 'It is not necessary that you should write your name; I will write your name and you can make your mark.' She said 'Well.' I immediately went back to the table and wrote her name. I think I sat down. I wrote her name, and then walked back to the bed, and I think Judge Lawton took a pen up, as he had been there all the time, and dipped it in the ink bottle; some one held the ink bottle on the bed. I said, 'This is your signature; I have written your name, and you can make your mark.' I took hold of the pen, and she made her mark by touching the pen at the top. I am positive she touched the pen. I then said, 'Do you acknowledge this to be your signature?' She said 'Yes.' I then read the attestation clause as it appears here, distinctly, and then put these questions: 'Do you declare this to be your last will and testament, and do you now request Judge Lawton and myself to sign it as subscribing witnesses?' She said 'Yes,' freely and distinctly. I then immediately wrote my name with the same pen that the mark was made with. The will was resting on a book; the book rested on the bed immediately before her; she was looking at it all the time. Judge Lawton wrote his name while the paper was resting on the book immediately before Mrs. Toomes, in my presence."

Here we have the fact that the testatrix made her mark to the instrument; the declaration that it was her will and testament, made in the presence and hearing of the witnesses; and the fact that the witnesses subscribed the same at her request, in her presence, and in the presence of each other, distinctly testified to by the witness Leake. We think this was sufficient.

The last objection made by the appellants that we will notice is, that the will is insufficiently witnessed. It is claimed that the party who wrote the name of the testatrix should have signed his name as a *part of the signature;* that "his name was an essential part of the signature," and that a witness to the signature cannot be a witness to the will. We are unable to see the force of this objection. Section 1278 of the Civil Code provides that a witness to a written will must write his name and his place of residence; and a person who subscribes the testator's name by his direction must write his own name as a witness to the will. But a violation of the section does not affect the validity of the will.

In our opinion the requirements of the above section were complied with in the present case.

Judgment reversed.

We concur: Sharpstein, J., Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed April 7, 1880.]

[No. 6499.]

GRIMM, APPELLANT, vs. O'CONNELL ET AL., RESPONDENTS.

TAXES—ASSESSMENT FOR 1872-3 WAS VOID—VOID ASSESSMENTS—DUTY OF ASSESSOR. It is the duty of the Assessor to ascertain the name of the owner of each piece or parcel of property, and to assess it *to him*; or, failing to ascertain the name of the owner, to assess it to "unknown owners." An assessment to C. G. *and all owners or claimants, known or unknown*, is void.

TAX DEED—RECITALS. Under sections 3776 and 3777 of the Political Code, the Tax Collector is required to execute and deliver to the purchaser a certificate stating, among other things, when known, the name of the person assessed; and section 3786 declares "that the matters recited in the certificate of sale *must be recited* in the deed. So a recovery must be had, if at all, upon the *tax deed*; and if its recitals show it to be void, no recovery can be had.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

P. B. Ladd, for appellant.

M. G. Cobb and *J. M. Burnett*, for respondents.

McKINSTRY, J., delivered the opinion of the Court:

1. The assessment for the fiscal year 1872-3 was *void*. (*Houghton* vs. *Austin*, 47 Cal. 646; *Wills* vs. *Austin*, 53 Cal. 179; *Harper* vs. *Rowe*, *Id.* 233.)

2. The Court below found that the demanded premises were assessed for taxes for the years 1874-5 and 1875-6 to one Charles Grimm; further, that "the Tax Collector's deeds upon those assessments (which afterwards became delinquent, etc.) recited that the said land had been assessed to said Charles Grimm, *and all owners or claimants, known or unknown*," etc. If the assessments were as recited in the deeds, they were legally *void*. (*Grotenfend* vs. *Ultz*, October Term, 1879; 4 P. C. Law Journal, 284; 13 Cal. 609; 30 *Id.* 537; 32 *Id.* 328.)

Sections 3776 and 3777 of the Political Code require of the Collector to execute and deliver to the purchaser a certificate stating, among other things, "when known, the name of the person assessed." Section 3786 declares: "The matters recited in the certificate of sale *must be recited* in the (Collector's) deed."

Where the statute prescribes the particular form of the tax deed, the form becomes substance, and must be strictly pursued, or the deed will be held void. (Blackwell on Tax

Titles, p. 366.) If the officer fails to make a deed which complies with the law, it would seem that he can be compelled by *mandamus* to execute a proper deed. (*Hewell* vs. *Lane*, 53 Cal. 213.) Where the statute form required a recital of the *year* for which the taxes were due, a deed in which the year was misrecited was said to be void. (*Maxcy* vs. *Clabaugh*, 1 Gilm. 26.) It is certainly competent for the Legislature to prescribe the form of the instrument which, as the result of a proceeding in *invitum*, can alone divest the citizen of his title. And when a form has been made necessary, it is not for the courts to inquire whether the required recitals are of material facts or otherwise. It was said by the Supreme Court of Massachusetts, speaking of certain arbitrary rules established by the Legislature with reference to the settlement of paupers: "The Legislature has seen fit, among other things, to establish as the criterion of a settlement, not the holding of an estate of a particular kind, * * but the introduction of the estate into the valuation of the assessors," etc. (apparently *not* the important circumstance). "These several requisites are indispensable." (*Monson* vs. *Chester*, 22 Pick. 390.) A special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued, and it should so appear on the face of the proceedings. Every requisite having the semblence of benefit to the person whose title is sought to be divested should be strictly complied with. (*Atkins* vs. *Kinman*, 20 Wend. 240.) Where a statute required *an administrator's* deed "to set forth at large the order of the Circuit Court directing the sale," a recital of the substance of such order was held not to be a compliance with the law, and that the deed could not support the title of the grantee. (*Doe ex dem. Smith* vs. *Hileman*, 1 Scam. 323.) In that case the order of Court was introduced in evidence and was *regular*, but the deed did not comply with the statute.

In the case before us the deed of the Tax Collector plainly showed *no title* in the plaintiff, since it appeared by the recital that the assessment was void. It cannot be contended that plaintiff could have recovered without introducing the deed. Having introduced the deed, he can claim for it no greater effect than the law confers upon it. (*Mayo* vs. *Haynie*, 50 Cal. 73.) The plaintiff certainly acquired no greater rights by reason of the *misrecital* in the deed, and which, taken as true, established that he acquired no right than he would have acquired if there had been no statement in the deed with respect to the name of the person assessed. If

the case had been as last supposed, the deed would have been invalid, and the omission could not have been supplied by evidence *aliunde*. Plaintiff must recover, if at all, on his *tax deed*, supported by evidence of the regularity of the prior proceedings if the same are attacked. He cannot recover on the *tax roll* or *delinquent list*. Where the law required separate parcels of land to be sold separately and a recital thereof, and the tax deed recited a sale of several "in a lump," the deed was held void. (*Boardman* vs. *Bourne*, 20 Iowa, 136.)

Statutes of Massachusetts provided that taxes assessed upon lands be levied by sale thereof "if the tax is not paid within fourteen days after demand," and required that the Tax Collector's deed should "state the cause of sale." The deed did not recite that payment was not made within fourteen days after demand. The Supreme Court of that State (in *Harrington* vs. *The City of Worcester*, 6 Allen, 578) said: "In this case the Collector's deed to the tenants, although it states a demand made on the persons taxed, does not state that payment was not made within the fourteen days. This is not a statement of a legal cause of sale; and the question, therefore, is whether this defect in the deed prevents the tenants from acquiring title under it. And the Court is of opinion that it does; that the provision in the deed 'shall state the cause of sale' is not merely directory, but that it is a condition precedent to the operation of the deed. If the legal cause of sale may be omitted in the deed, and the defect be supplied by proof *aliunde* or by admission, *so may any or all the other matters* which the statute requires that the deed shall state. The Collector has a mere naked power to sell estate for the non-payment of taxes thereon, and to convey a title thereto to the purchaser; but in such a case the law requires that all the prerequisites to the exercise of that power must precede its exercise. Among these prerequisites to the conveyence of the estate so sold is the statement, in the deed of conveyence, of the cause of sale. Unless a legal cause of sale is therein stated, the attempted conveyance is invalid. (See Sug. on Powers, 8th ed., 206 *et seq.*; 2 Washb. on Real Prop. 542 *et seq.*)"

So in Wisconsin (the statute requiring that the tax deed should comply with the form prescribed by law) it was held that the mere omission from the recitals of the words "as the fact is" constituted a fatal defect. (*Lain* vs. *Cook*, 15 Wis. 446; *Wakeley* vs. *Mohr*, 18 *Id.* 321.)

Judgment affirmed.

We concur: McKee, J., Ross, J.

IN BANK.

[Filed March 23, 1880.]

[No. 10,481.]

EX PARTE FREDERICK K. CLARKE, ON HABEAS CORPUS.

CRIMINAL LAW—RESUBMISSION—DISMISSAL OF CHARGE—SUBSEQUENT ARREST—JEOPARDY—HABEAS CORPUS. Where the petitioner for *habeas corpus* had been charged with murder, and after a resubmission to the grand jury and a dismissal of the charge by them, and an order made discharging the petitioner, he is arrested under a warrant issued on a complaint filed with a justice of the peace charging him with murder, the writ will be denied. There is no limitation of time applicable to prosecutions for murder, and he had never been put in jeopardy within the meaning of the Constitution.

IDEM. If the Court resubmits a charge once *ignored*, the resubmission must be at the same term and must precede any action of the Court with reference to the dismissal of the *action*.

IDEM. It is only where the Court has determined *not* to resubmit the charge to another grand jury that the order dismissing the action can properly be made.

IDEM—LIMITATION OF POWER TO RESUBMIT. When a grand jury has dismissed a *charge* against a defendant, the Court at the close of the term must dismiss the *action* against the same defendant and discharge him from custody, unless it shall have reason to believe that the jury in attendance at the succeeding term may properly indict him.

Petition for writ of *habeas corpus*.

E. D. Sawyer and *D. W. Murphy*, for petitioner.

E. M. Gibson, *District Attorney*, and *W. W. Foote*, of counsel.

MCKINSTRY, J., delivered the opinion of the Court:

At the conclusion of a term of the County Court, at which a charge of murder against the petitioner had been *resubmitted* to the grand jury, under section 941 of the Penal Code (the grand jury having dismissed the charge), the Court made an order discharging the petitioner, and releasing the sureties upon his bail bond.

Petitioner was afterwards arrested under a warrant issued on a complaint filed with a justice of the peace charging him with the crime of murder, and is now in custody pending his examination before such justice as a committing magistrate.

Sections 941 and 942 of the Penal Code are as follows:

"SEC. 941. If twelve grand jurors do not concur in finding an indictment against a defendant who has been held to answer, the depositions and statement, if any, transmitted to them must be returned to the Court, with an endorsement thereon, signed by the foreman, to the effect that the charge is dismissed."

"SEC. 942. The dismissal of the charge does not prevent its resubmission to a grand jury as often as the Court may direct; but without such direction it cannot be resubmitted."

These sections are to be considered in connection with the following:

"SEC. 1382. The Court, unless good cause to the contrary is shown, must order the prosecution or indictment to be dismissed in the following cases:

"1. When a person has been held to answer for a public offense, if an indictment is not found against him at the next term of the Court at which he is held to answer.

"2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial at the next term of the Court in which the indictment is triable, after it is found."

"SEC. 1383. If the defendant is not indicted or tried, as provided in the last section, and sufficient reason therefor is shown, the Court may order the action to be continued from term to term, and in the meantime may discharge the defendant from custody on his own undertaking of bail for his appearance to answer the charge at the time to which the action is continued."

"SEC. 1384. If the Court directs the action to be dismissed, the defendant must, if in custody, be discharged therefrom; or, if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him."

It will be observed—reference being had to section 942 alone—that when a *charge* has been dismissed by a grand jury, it is entirely within the discretion of the Court to resubmit it to the same or another grand jury as often as the Court may direct. No showing is made a prerequisite to the resubmission; but, unless restrained by some other provisions of the Code, the power may be employed at the discretion of the Court. Section 1382, however, makes it the duty of the Court, at the end of the term at which a party has been held to answer, to dismiss the *prosecution* or *action* (the two following sections clearly indicating that the words are used synonymously), "unless good cause to the contrary is shown." Here, then, is a limitation upon the power of the Court to resubmit. Whatever may be good cause for refusing to dismiss the action, it is quite certain that no such cause can exist unless, upon the facts presented or suggested, the Court has reached the conclusion that the case is one which might properly be submitted to another grand jury. It would be morally absurd to order that a de-

fendant should be kept in custody until the next term, when the Court was convinced that it was not a case which in any event should be examined by the grand jury to be empaneled at the next term. When a grand jury has dismissed a *charge* against a defendant, the Court at the close of the term must dismiss the *action* against the same defendant and discharge him from custody (section 1384), unless it shall have reason to believe that the jury in attendance at the succeeding term may properly indict him. If therefore the Court resubmits a charge once *ignored*, the resubmission must be at the same term, and must of course precede any action of the Court with reference to the dismissal of the *action*. It is only where the Court has determined *not* to resubmit the charge to another grand jury that the order dismissing the *action* can properly be made. Until the action is dismissed—no indictment having been found—the case remains for disposition in the Superior Court. But the order dismissing the *prosecution* ends the action commenced by the complaint upon which the magistrate issued his warrant of arrest. It ends the action, however, not by any judgment upon the merits of the case, but by an order in the nature of judgment nonsuit—a simple expression of the opinion of the Court that that particular proceeding ought not to be further prosecuted.

Inasmuch as there is no limitation of time applicable to prosecutions for *murder*, and as a defendant in whose favor an order of dismissal of the action has been made has never been put in *jeopardy* within the meaning of the Constitution, a new action on behalf of the people may in such case be initiated at any subsequent day, either by presentment of a grand jury or by a complaint filed with any magistrate.

As we have seen, if the Superior Court retains the power to resubmit a charge once or oftener dismissed by a grand jury, for any length of time after the *prosecution* has been dismissed, the power may be employed at the option of the judge, or of any number of successive judges, without complaint or evidence, or any cause shown. The practicable difficulties inseparable from such construction of the statute seem to have occurred to counsel, who suggested at the argument that the power should be exercised by the Superior Court only after the defendant had been re-arrested under warrant issued out of that Court, and his case re-examined. To authorize such a proceeding, we would have to supplement the section of the Code with other sections providing for the issuing of such warrant, the admission to bail in certain cases, etc. In the first place, the language of section

942 is plain, and does not contemplate any new warrant and examination in such case. In the second place, we are not empowered to legislate or provide machinery which the lawmakers have not provided, but which they have rejected. And in the third place, no benefit would accrue to a party charged with crime, since the result of the proposed changes in the law would only be to confer on the Judge of the Superior Court, in another form, the same power which he now possesses in common with all other magistrates—to-wit, the power to issue a warrant, and to examine and hold to answer.

We have only to add that the main question involved in the present application was expressly decided in *Ex parte Cahill*, 52 Cal. 463. In that case the facts were like those of the present, except that there the County Court had made an order resubmitting to "the next grand jury" *after* it had dismissed the action, or discharged the defendant from custody. But the Court did *not* there hold that the power to resubmit continued after the prosecution had been dismissed, and there could have been no pretense that the order of resubmission in and of itself constituted a warrant or process which justified the Sheriff in restraining the party of his liberty. The Court in terms declared that the Sheriff was justified in holding his prisoner by the warrant of the justice of the peace. The Court says: "No bar to another prosecution having occurred, and the prisoner being at large without bail in consequence of the order of the County Court discharging him from custody, it was competent for any committing magistrate of the proper county to examine the charge made against him; and if upon such examination he appeared to be guilty, to hold him to answer." (52 Cal. 464.)

The prisoner must be remanded to custody. So ordered.

We concur: Ross, J., Thornton, J., Sharpstein, J., Morrison, C. J., Myrick, J.

I dissent: McKee, J.

DEPARTMENT NO. 1.

[Filed April 17, 1880.]

[No. 6027.]

PAYNE, APPELLANT, vs. McKINLEY, RESPONDENT.

PRACTICE AND PLEADING—INSUFFICIENCY OF ALLEGATION OF SPECIAL DAMAGE BY A PUBLIC NUISANCE. In a pleading alleging special damages that will result unless the construction of a public nuisance is enjoined, *facts* must be stated to show that the apprehension of injury is well founded.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

O. P. Evans and *Alfred Wheeler*, for appellant.
H. H. Haight, for respondent.

Ross, J., delivered the opinion of the Court:

Plaintiffs, who are private persons, are the owners and in possession of a certain block of land fronting on Berry Street in the city and county of San Francisco, and bring this action to enjoin defendants from constructing a street railroad in and upon said street. The only averment of injury to plaintiffs found in the complaint is the following: "That the use and occupation of said street by defendants, for the purpose of constructing and operating said railroad as aforesaid, would cause great and irreparable injury to plaintiffs and their property by reason of the constant obstruction and use of the said street by the said defendants in front of plaintiffs' premises, as aforesaid."

The insufficiency of this pleading to show such special damage to plaintiffs as would enable them to maintain an action to enjoin the construction of a public nuisance is obvious. *Facts* must be stated to show that the apprehension of injury is well founded. (Dillon on Mun. Cor., sec. 522, and authorities there cited; *Bigley* vs. *Nunan*, 53 Cal. 403; *George* vs. *N. P. T. Co.*, 50 Cal. 589; Civil Code, sec. 3493.)

For this reason, as well as for the reason that in the record we discover no abuse of discretion of the Court below in dissolving the preliminary injunction, the order is affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed April 6, 1880.]

[No. 6993.]

HILL, RESPONDENT, vs. FINNIGAN, APPELLANT.

APPEAL—FAILURE OF SURETIES ON UNDERTAKING TO JUSTIFY—FILING OF OTHER UNDERTAKINGS IN APPELLATE COURT—POWERS OF APPELLATE COURT TO ORDER SUPERSEDEAS. Where an appellant filed in the Court below undertakings in form complying with and executed as required by sections 941 and 942 of the Code of Civil Procedure, and the sureties failed to justify after being excepted to, sufficient undertakings may be filed in the Appellate Court when there is nothing to indicate that the failure to justify was the result of other causes than inadvertence; and the Court has power to make an order to operate as a *supersedeas*.

Appeal from the District Court of the Fifteenth Judicial District, San Francisco County.

Geo. R. B. Hayes, for respondent.
Lloyd & Newlands, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

The appellant filed in the Court below undertakings in form complying with and executed as required by sections 941 and 942 of the Code of Civil Procedure. Respondent excepted to the sufficiency of the sureties, and neither they nor other sureties justified. Appellant asks leave to file sufficient undertakings in this Court.

1. The undertaking on appeal—the filing of which, by section 940 of the Code of Civil Procedure, is necessary to render the appeal effectual for any purpose—is the $300 undertaking mentioned in section 941. This is made manifest by reading the several sections in their order; and it was in effect so held in *Schuct* vs. *Odell*, 52 Cal. 449, and *Hill* vs. *Finnigan* (March 13, 1880). There is nothing in section 942, or elswhere in the Code, which prohibits the making and filing of a stay-undertaking at any time before the execution is satisfied by sale under it. An execution may be issued upon the judgment after the cause has been brought here on appeal, and after the appeal it may be stayed by proper undertaking filed below. Whenever the stay-bond or undertaking has been properly executed (and the sureties have justified if excepted to), or the Court below shall have dispensed with security in cases where it has power so to do, "the appeal is perfected" in the larger sense in which the words are used in section 946. By reason of the notice of appeal and the $300 bond, the case is in this Court, so far as is necessary, for a review of the action of the Court from which the appeal is taken with reference to the conduct and trial of the cause. So far as the execution of the judgment is concerned, the judgment below remains in full force until the appeal is perfected by the proper stay-undertaking and the justification of the sureties, if excepted to.

2. But section 948 of the Code of Civil Procedure provides that, unless the sureties upon the stay-undertaking, or others in their stead, shall *justify*, "execution of the judgment * * * is no longer stayed." After a careful consideration of the different sections of the Code, we are convinced that they contemplate but one proceeding to stay the execution below, and that the failure of the sureties to justify leaves the plaintiff in a position to enforce the execution of his judgment—a position the advantages of which he cannot be deprived of by any further act of appellant in the Court below. Otherwise a series of pretended efforts to *justify* might lead to great delay in setting aside the stay, without respondent being afforded any real security for the payment of his judgment in case it should be affirmed.

3. Yet it might very well be that an appellant, unable to furnish proper sureties at one time, might subsequently, and pending the same appeal, be able to obtain competent and amply sufficient bondsmen. True, the machinery of appeal is established, and the mode and manner of giving security in the *lower* Court is regulated by the statute. But the statute does not treat of undertakings in the Supreme Court; and we have no doubt but this Court has an inherent power to secure to the appellant the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right. There is nothing in the present record to indicate that the failure to justify was the result of other causes than inadvertence, and this Court will make an order to operate as a *supersedeas* upon *proper terms*.

Ordered that on notice to the counsel for respondent, appellant do appear before Mr. Justice McKee, prepared to deposit such sum or to execute such undertaking as shall comply with the views hereinbefore expressed; if an undertaking be executed, the sureties then and there to *justify*.

We concur: McKee, J., Ross, J.

IN BANK.

[Filed April 5, 1880.]

[No. 6694.]

EDWARD P. REED, RESPONDENT,

vs.

ROBERT ALLISON ET AL., APPELLANTS.

DISMISSAL OF APPEAL—MOTION TO SET ASIDE—RENEWAL OF. A renewal motion to set aside a dismissal of appeal must be made with leave of the Court.

POWER OF PRESENT COURT OVER THE ORDERS AND JUDGMENTS OF ITS PREDECESSOR. The present Supreme Court will not interfere with the orders and judgments of its predecessors where rights might have been acquired under such orders and judgments. It would be the exercise of an appellate power which the Court does not possess.

Appeal from the Probate Court of Alameda County.

Houghton & Reynolds, Chase & Leach, Hartman, Wright, McElrath, Birch, Bodley & Campbell, and *S. Halsey*, for respondent.

E. F. Head, J. N. Thorne, and *H. P. Irving*, for appellants.

MORRISON, C. J., delivered the opinion of the Court:

The following are the facts of this case: On the 2d day of July, 1879, appellants filed their transcript on appeal in this Court, and on the 24th day of the same month a notice was

served and filed of a motion to dismiss the "pretended appeal," and to strike the transcript from the files of the Court, on the following grounds:

1. More than forty days for filing an authenticated transcript herein have passed, and no such transcript has been filed.

2. All the parties to the said interlocutory judgment have not been served with the notice of appeal.

3. The said notice of appeal is not addressed to any of the parties herein; nor are any of them informed when they will be required to respond to the appeal."

The above motion was heard by the late Supreme Court, and on the 31st day of July the following order was made by the Court:

"Motion to dismiss and strike transcript from the files argued. It is adjudged that no appeal has been taken from the interlocutory judgment herein, or from the order denying the motion of Luco, Treat, and Allison for a new trial; and it is therefore ordered that the transcript be stricken from the files."

On the 15th day of September the parties filed a notice of motion, affidavit, etc., to set aside the above order striking the transcript from the files; and on the 25th of that month said motion was denied. On the 15th day of October the same parties (Luco, Treat, and Allison) filed their petition for a rehearing of their motion to reinstate the said cause on the calendar, and on the 3d of November said motion was denied by the Court. This is a renewal of the motion made on the 15th of March, 1880, without leave of the Court.

That the motion is renewed without leave of the Court would be a sufficient ground for the denial thereof. (*Ford* vs. *Doyle*, 44 Cal. 635; *Bowers* vs. *Cherokee Bob*, 46 Cal. 279.) But we do not rest our opinion upon that ground.

It does not appear, from the order of the Court striking the transcript from the files, upon what ground the order was based; but we were told upon the argument that the transcript was stricken from the files for the reason that the notice of appeal was insufficient. If the question of the sufficiency of the notice was now before the Court for the first time, we are not prepared to say that we would hold it defective; neither are we prepared to say that the motion to strike from the files would be sustained; but it does seem to us that the whole matter has passed beyond the reach of the Court. The order was made on the 31st of July, 1879, and two ineffectual attempts were made to have it set aside. We are now called upon, after an interval of nearly eight months,

to review the decision of the late Court, and set aside, vacate, and annul an order made by it, after argument and with due consideration, and not inadvertently, as claimed by the learned counsel who makes the motion.

Rights may have been acquired—indeed, it is said that rights have been acquired—on the faith of the order complained of, and it would be a dangerous thing to interfere with the order at this late day. To do so would be to exercise an appellate power over the orders, judgments, and decrees of our predecessors which the Court does not possess.

Motion denied.

We concur: Ross, J., Thornton, J., Myrick, J., McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed April 6, 1880.]

[No. 6511.]

FRANCISCO GAGLIARDO, APPELLANT,

VS.

A. J. J. VICTOR DUMONT ET AL., RESPONDENTS.

HOMESTEAD—TRANSFER OF—POWER OF ATTORNEY. Under the provisions of the homestead law as it existed on the 13th day of April, 1872, a conveyance of homestead property by a power of attorney executed by the husband is invalid; and upon the death of the wife the homestead descends to the husband, and the title vests in him as survivor.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

J. R. Sharpstein, for appellant.

Jarboe & Harrison, for respondents.

McKEE, J., delivered the opinion of the Court:

On May 25, 1867, the plaintiff in this action was the owner of the land and premises described in the complaint, and he and his wife, Anna Gagliardo, resided thereon. On that day the husband made and signed a declaration in writing of his intention to claim the premises as a homestead, and on the same day executed a power of attorney to one Antonio Daneri, authorizing and empowering him to enter into and take possession of all the real estate which belonged to the plaintiff in the city and county of San Francisco, and sell and convey the same, or any part thereof, and execute and deliver to the purchaser or purchasers good and sufficient deeds, etc.

On the 30th of May, 1867, the declaration of homestead was acknowledged and recorded, and on the same day the power of attorney was also acknowledged and recorded. On the 13th of April, 1872, Daneri, the attorney in fact of the plaintiff, by his deed duly executed under his power of attorney, sold and conveyed the homestead premises to one Stephen Sanguinetti, and the wife of the plaintiff joined in the deed. On the 14th of November, 1873, the wife died. Defendants are in possession of the premises, claiming the same by conveyance from Sanguinetti.

According to the provisions of the homestead law, as it existed at the time of the transactions in this case, the plaintiff and his wife, who were entitled to the homestead premises in question, held the same—to the extent of the homestead value—in joint tenancy; and their alienation, incumbrance, or abandonment was prohibited except in the mode prescribed by the law itself.

Says the statute: "No alienation, sale, conveyance, mortgage, or other lien of or upon the homestead property, shall be valid or effectual for any purpose whatever, unless the same shall be executed by the owner thereof, and be executed and acknowledged by the wife, if the owner be married and the wife be a resident of this State, in the same manner as provided by law in case of the conveyance by her of her separate and real property." (Sec. 2, Act of 1862.)

The law which created the estate at the same time prescribed the mode of transferring it. Of the power of the Legislature to declare the nature of an estate in real property and to prescribe the modes by which it may be alienated, there can be no question. "No man," says Mr. Justice Baldwin, in *Lees* vs. *De Diablar*, 12 Cal. 327, "has any vested right to dispose of any property, by whatever title he holds, in any way other than that which the law prescribes." Under the restraints imposed by the homestead law, neither the husband nor the wife had the power to transfer the homestead by a separate conveyance, nor could either incumber it to the prejudice of the other or of both, or to the destruction of the homestead itself. The obligation between them in respect to its preservation was reciprocal. Neither could, without the consent and concurrence of the other, alienate or transfer it. It was created as a place of residence for the family, and it is the policy of the law to preserve it intact for that purpose until both the husband and wife shall mutually resolve to destroy it by alienation or abandonment. In pursuance of that policy its destruction is prohibited, except by the joint act of both in the mode provided by the homestead law.

This is the settled doctrine of the courts of this State. Thus in *Barber* vs. *Babel*, 36 Cal. 11, it was held that when once the homestead estate vested in the husband and wife, the husband could not by his act alone mortgage it, or by the execution of a new note and mortgage revive a prior mortgage given upon the land before the declaration of homestead was filed. And in *Fledge* vs. *Garvey*, 47 Cal. 371, where, after a homestead had been created, the husband became insane, and his guardian, under an order of the Probate Court of Sonoma County, sold and conveyed the homestead for the maintenance and support of the insane husband as a ward of the court and his family, it was held that the sale was invalid, and wholly inoperative to pass the estate, although the wife had consented to it and received part of the proceeds of the sale.

As therefore a conveyance of the homestead by either spouse would be invalid, whether made directly or indirectly, voluntarily or by forced sale, it would seem to follow that a power of attorney made by the husband to convey it would be also invalid; for, as the husband himself cannot dispose of it, he cannot empower another to do for him what the law forbids him to do. Having no capacity to convey it independently of his wife, he cannot delegate to another a power which he himself does not possess. Besides, the law is imperative that the alienation of the homestead must be by the personal act of the husband and wife. As it is declared to be a joint estate for their benefit and security, neither can separate it; for to do that would destroy it as a home. Nor can either of them act in the alienation of it by proxy. The wife certainly cannot, because she alone can make the acknowledgment which is required by law as part of her conveyance. She could not, until legislation enabled her to do so, convey her separate estate at all by an attorney in fact. Neither could her husband assent by an attorney in fact to her conveyance.

In *Green* vs. *Swift*, 49 Cal. 260, it was doubted whether the husband could delegate to another power to act with his wife in the conveyance of her separate property; but if he could, says the Court, the power of attorney must expressly or by necessary implication confer the power. And in *Meagher* vs. *Thompson*, 49 *Id.* 189, it was held that the assent of the husband to a conveyance of his wife's separate property must be expressed by his own signature to the conveyance; he cannot delegate authority to another to sign for him. If the assent of a husband to a conveyance of the separate property of his wife cannot be expressed in any other way than by his

own signature, much more is that expression necessary in the alienation of the homestead; for in the one the husband had no title to transfer—his assent was only required for the wife's protection in dealing with third persons, or as a precaution against imposition upon her; but in the other he has a joint estate with her, and he has to join with her in transferring it, not only as a protection to her, who is a co-partner with him, but to transfer his own estate, and concurrently with her to destroy it as the home of the family.

Whether the alienation or abandonment of the homestead would be for the interest of the family is for the husband and wife to determine. The one is no less interested in that than the other. No third person, whether acting as attorney for either or both, can determine that question for them; and their will in that regard must be manifested by their joint act, expressed by their personal signatures, and personally acknowledged according to law.

Moreover, if the husband could delegate to another power to convey his estate in the homestead, the power of attorney, as was said in *Green* vs. *Swift*, should expressly or by necessary implication confer such a power. But it will be observed that the power of attorney under consideration does not expressly or by necessary implication authorize the attorney in fact to sell and convey the homestead. It only authorized the attorney to enter into and take possession of all the real estate belonging to the plaintiff in the city and county of San Francisco, and to lease, bargain, sell, grant, and convey the whole or any part thereof. But the homestead of the spouse was no part of the separate real property of the husband; therefore the power of attorney did not authorize the attorney to sell and convey the homestead. But whether it did or did not, it would be futile: if it did, it would be ineffectual for the purpose of alienation, because the husband himself could not dispose of it by his separate deed, and he could not do by another what he could not do himself; and as the sole object of the power seems to have been to enable the attorney to sell and convey property other than the homestead, the deed of the homestead executed by the attorney passed no title.

Upon the death of the wife the homestead descended to the plaintiff, and the title to it at once vested in him as survivor. (Section 1265, Civil Code; *Estate of Headen*, 52 Cal. 295.) He had therefore a right of entry upon the premises at the commencement of his action, and was entitled to judgment.

Judgment reversed and cause remanded.

We concur: McKinstry, J., Ross, J.

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Current Topics.

TO KEEP well posted as to what is being decided by our Supreme Court you must subscribe for the JOURNAL.

THE proceedings instituted to remove the Mayor of this city from office are regarded as a political move.

OUR Supreme Court has declared the freeholders' election valid.

THE Supreme Court of the United States has adjourned for the term.

L. D. LATIMER, Esq., has been appointed Judge of the Superior Court of this city and county to fill the vacancy caused by the death of Judge DAINGERFIELD.

MARCUS P. WIGGIN, Esq., has been appointed Judge of the Superior Court of Mono County to fill the vacancy caused by the death of Judge BRIGGS.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed April 21, 1880.]

[No. 6968.]

ASHLEY, RESPONDENT, vs. OLMSTEAD, APPELLANT.

APPEAL FROM JUDGMENT—WHAT REVIEWED. On an appeal from the judgment, the action of the Court below sustaining a demurrer may be reviewed.

HOMESTEAD—INSUFFICIENT DECLARATION. A declaration of homestead *must contain* an estimate of the actual cash value of the premises. Each and every requirement of section 1263 respecting the declaration must be followed.

Appeal from the District Court of the First Judicial District, Santa Barbara County.

Hall & Hatch, for respondent.

Richards & Boyce, for appellant.

MYRICK, J., delivered the opinion of the Court:

This is an appeal from a judgment decreeing foreclosure of mortgage and sale of the premises therein described. The questions in controversy relate to a portion only of the premises, and to the proceedings regarding such portion.

November 17, 1873, defendant Sarah A. Olmstead, wife of defendant Stephen H. Olmstead, executed and filed in the County Recorder's office of the county of Santa Barbara a declaration of homestead upon the portion above referred to. August 1, 1876, defendant Stephen H. Olmstead executed the mortgage in question, embracing a tract of land which includes the premises declared upon as a homestead. The declaration of homestead contained a description of the premises, and the statement of the declarant "that I am married, and that I do now reside with my family on the lot of land, * * * and that it is my intention to use and claim the said lot of land and premises, together with the dwelling-house thereon and its appurtenances, as a homestead; and I do hereby select and claim the same as a homestead." The declaration contains no statement or estimate of the value of the premises. Mrs. Olmstead was made a party to the suit for foreclosure, with the allegation in the complaint that she "has or claims to have some interest or claim upon said premises, or some part thereof, by virtue of a homestead declaration, which claim or interest is subject to the lien of the plaintiff's mortgage."

The defendants S. H. and S. A. Olmstead answered, set-

ting up the homestead declaration and residence, and that the homestead was selected from community property; that the premises were at the selection and are of no greater value than $4,800, and that neither of them have selected any other homestead. The defendant Sarah A. Olmstead filed a cross bill, setting up the facts relating to the homestead, and the value of the same, and asked judgment that the same are not subject to the lien of the mortgage. The plaintiff demurred to the answer and cross bill, and the demurrers were sustained. Judgment of foreclosure was given, directing a sale of all the premises described in the mortgage. Defendant Sarah A. Olmstead appealed from the judgment.

The plaintiff (respondent) makes two points in this Court, viz.:

1. The appeal being from the judgment alone (no reference being made in the notice of appeal to the orders sustaing the demurrers), this Court is confined to an examination of the record relating to the judgment only, and cannot notice the action of the Court below on the demurrers.

2. The declaration of homestead is insufficient to create a homestead exemption, because the declaration shows that it was made by the wife, and does not show "that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit," and because it does not contain a statement of the actual cash value of the premises sought to be selected.

As to the first point, reference to *Hibbard* vs. *Smith*, 39 Cal. 145, will furnish a full exposition of the law upon that subject, viz.: "From an order sustaining a demurrer * * * no appeal can be taken directly to this Court. The only method of review of such proceedings here is through an appeal from the final judgment thereafter entered in the action itself, if such judgment be unfavorable." See also *Agard* vs. *Valencia*, 39 Cal. 292, where it was held that, on appeal from the judgment, an order sustaining a demurrer may be reviewed.

As to the second point: The statute in force at the time the declaration was filed, after providing that either husband or wife may make the selection, reads as follows:

"SEC. 1263 (C. C.) The declaration of homestead must contain—(1) A statement of the facts that show the person making it to be the head of the family. (2) A statement that the person making it is residing on the land, and claims it as a homestead. (3) A description of the land. (4) An estimate of its actual cash value."

Subsequently an amendment was made to the first subdivision of the section, taking effect July 1, 1874, by adding the words "or when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit." These words do not affect the declaration in question, as they were not part of the statute when the declaration was made. The statute, however, in force November 17, 1873, when the declaration was filed, did contain the words "the declaration of homestead *must* contain * * * an estimate of their *actual cash value*." The declaration is entirely silent upon the subject of value. We are asked by the appellant to hold that the provision of the statute relating to value is directory merely; that its omission does no harm, misleads no one, and does not substantially affect the rights of any party.

The Constitution of this State (sec. 15, Article IX) contained the provision that "the Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." This section, although it gave a right to have a homestead protected, required legislation to enforce it and make it available. "The Legislature shall protect by law." The Legislature, then, in pursuance of that direction, *did* provide for the protection of a homestead; and in proceeding to that end did enact that a party wishing to be protected *should do* certain things—viz., execute, acknowledge, and have recorded an instrument, declaring that he or she was qualified to select a homestead; that the land was resided upon and claimed as a homestead; that the premises are properly described, and giving their actual cash value. The Legislature has deemed it proper to require each and every one of these things to be necessary. Have we, then, the right to say that either is unnecessary? If yea, why one rather than another? If any one, why not all?

The appellant is not aided by section 4 of the Civil Code. "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

There is nothing in section 1263 of the Civil Code, as applicable to this case, requiring construction. The language is plain that the declaration *must contain* an estimate of the actual cash value of the premises.

We are asked to construe the words "must contain" so as

to mean *need not contain*. We do not feel at liberty to do so. We are not here to legislate, but to declare the law as we find it; and in this instance we find it plainly written. The Constitution and laws of this State are beneficent in regard to protecting families from the misfortunes and improvidence which frequently overtake the heads of families; and clear, plain, simple, and direct means are provided for parties who wish to avail themselves of the benefits guaranteed. In this case the fault is not with the law.

We fail to see how any person, with section 1263 of the Civil Code before him, could properly omit to see what were its requisites, so plainly set down that "he who runs may read," or to insert those requisites in the declaration. We would suggest that in preparing a paper of the importance of a declaration of homestead, a very commendable prudence would be to first look at the statutes upon the subject and then follow them.

Judgment affirmed.

We concur: Morrison, C. J., Thornton, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed April 26, 1880.]

[No. 6746.]

CONNER, APPELLANT, vs. BLUDWORTH, RESPONDENT.

PRACTICE AND PLEADING—POSSESSION—SURPLUS ALLEGATIONS. Where the plaintiff alleges possession of property by virtue of certain recorded instruments, the allegation of possession is sufficient without stating the means by which he holds possession; and copies of such instrument need not be incorporated in the complaint.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Geo. E. Otis, for appellant.

R. E. Arick, for respondent.

MYRICK, J., delivered the opinion of the Court:

Plaintiff alleges that on July 17, 1878, he held and was in possession of certain lands, describing them, and of the growing crop of wheat thereon; that while he was in the possession and entitled to the possession of said land and growing crop, defendants, against the will of plaintiff, willfully and unlawfully entered into and upon said land and took possession of said growing crop, and without the consent of plaintiff and against his will did unlawfully cut

said crop, and take and keep possession thereof; that plaintiff was and is the owner and entitled to the possession of said crop; that defendants detain the same, and refuse, after demand, to deliver the same to plaintiff, to plaintiff's damage, etc.

Plaintiff also states that he was in possession of said land and crop, and entitled thereto by virtue of certain instruments of writing of record in the office of the County Recorder of Kern County, stating dates, books, and pages of record.

Defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. The dumurrer was sustained; and plaintiff failing to amend, judgment went for defendants, and plaintiff appealed.

On the argument we were informed by respondent that he seeks to sustain the ruling of the Court below on the demurrer, and claims that the complaint does not sustain facts sufficient to constitute a cause of action in this:

1. That the plaintiff claims that he is entitled to the possession of the crop of grain "by virtue of certain conveyances and instruments duly recorded," and does not annex the originals or copies, or incorporate them in the complaint.

2. The instruments were brought into Court under defendants' plea of oyer; and on plaintiff failing to incorporate them in his complaint, defendants had a right to make them part of the pleading, and demur if a material variance appeared.

3. As there is a material variance between the complaint and the instruments, as appears therefrom on their being produced, defendants may demur to plaintiff's complaint.

As to the first point, plaintiff does not declare on the instruments, but alleges possession, which is sufficient, without stating the means by which he had possession. The allegations relate to the instruments, and are surplusage in a pleading, though the instruments may be evidence.

As to the second and third points, we are not advised by the transcript that any proceedings for oyer were had, nor that the instruments were produced, nor that there was any variance. Neither does it appear to us how questions of that character could be raised on demurrer to complaint, where, as in this case, the plaintiff does not count on the instruments.

Judgment reversed, and cause remanded to the Superior Court of Kern County, with instructions to overrule the demurrer, with leave to defendants to answer.

We concur: Thornton, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed March 31, 1880.]

[No. 6423.]

CRANE ET AL., RESPONDENTS,

vs.

WEYMOUTH ET AL., APPELLANTS.

WRIT OF ERROR FROM THE UNITED STATES SUPREME COURT—JUDGMENT BY THAT COURT—DIRECTIONS OF. The Supreme Court of the United States, upon writ of error in reversing or affirming the judgment of the Supreme Court of the State, may in its discretion award execution or *remand* the same to the Supreme Court with directions.

COLLATERAL ATTACK ON JUDGMENT. The judgment of the Supreme Court of the United States, nor that of the State Court made in accordance therewith, is subject to collateral attack.

UNDERTAKING UPON APPEAL IN EJECTMENT—ACTION UPON—WHEN NOT PREMATURE. An action upon an undertaking on appeal in ejectment, to recover costs and damages, and the value of the use and occupation pending the appeal, is one upon a *contract*, and not of *trespass for mesne profits*; and is not prematurely brought because commenced before the plaintiffs in ejectment had regained possession.

Appeal from the District Court of the Third Judicial District, Alameda County.

H. F. Crane, for respondent.

Moore, Laine & Lieb, for appellant.

McKINSTRY, J., delivered the opinion of the Court:

Defendants were sureties upon an undertaking on appeal in an action of *ejectment*, wherein one Huff was plaintiff and C. W. Doyle defendant; and the present action was brought by plaintiffs upon the *undertaking* to recover the costs and damages, and for the value of the use and occupation by the defendant in ejectment pending the appeal.

This Court reversed the judgment in ejectment of the District Court, and directed that Court to render judgment in favor of Doyle for his costs, etc. In obedience to the remittitur of the Supreme Court, the District Court entered judgment in favor of Doyle for his costs. Subsequently Huff "caused a *writ of error* to be issued out of the Supreme Court of the United States, whereby said cause was removed from the Supreme Court of the State of California to said Federal Court for review; and such proceedings were had and taken in said cause in the Supreme Court of the United States that on the 15th day of January, 1877, said last named Court made and caused its judgment to be entered therein, whereby the judgment and order of the Supreme Court of California made in said cause on the 6th day of April, 1875, aforesaid, was

reversed, and said cause was remanded to said last named Court, with diretions to affirm the judgment of the District Court of the 21st of January, 1874, aforesaid." (Finding IV.)

The mandate of the Supreme Court of the United States ran to the Supreme Court of the State, and in accordance therewith the latter "caused to be entered its order and judgment, whereby it was ordered and adjudged that the order and judgment of said Court made on the 6th day of April, 1875, be vacated and set aside, and that the District Court do vacate and set aside its judgment of the 4th of August, 1875, in favor of said Doyle for costs; and it was further ordered and adjudged that the judgment of the District Court made and entered in said action on the 21st of January, 1874, be in all things affirmed." (Finding V.)

This proceeding accorded with the law of the United States. "A final judgment or decree in any suit in the highest court of a State, in which a decision in that suit could be had, * * * may be re-examined, and reversed or affirmed in the Supreme Court upon writ of error. * * * The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may at their discretion award execution *or remand the same to the Court from which it was removed by the writ.*" (Desty's Federal Procedure, p. 102, sec. 709.)

It is said by counsel for appellant that the "judgment of the Supreme Court of the United States acts upon the case and parties, and not upon the State Court; that the process should issue directly from the United States Supreme Court to the Marshal, and not from the State Court." As we have seen, however, the Court may, "at their discretion, award execution *or remand*," etc. The judgment of the Supreme Court of the United States reversed the judgment of the Supreme Court of the State, and remanded the cause "with directions to *affirm the judgment* of the District Court." To give effect to the suggestion of appellant, we should be obliged to hold either that the judgment of the Supreme Court directing a judgment by this Court, or the order of this Court setting aside its former judgment and entering a judgment in accordance with the mandate of the United States Supreme Court, *was void.* We are quite certain that neither is subject to collateral attack.

The contract of defendants was, that if the judgment of the District Court should be affirmed by the Supreme Court of the State, they would pay, etc. The judgment was affirmed, and their liability accrued. The legislation of the State is to be construed in view of the possibility that a judgment of this Court reversing a judgment of the District Court

might in turn be reversed, and that no final judgment of this Court could, in such case, be entered until the cause had been disposed of in the Supreme Court of the United States. Assuming that the last judgment of this Court is not absolutely *void*, it is a judgment, and the only one affirming the judgment of the District Court.

The present is not an action of *trespass for mesne profits*, but an action brought against the original obligors upon a *contract* on which, by its terms, the liability of defendants has accrued. The point that the action was prematurely brought, because commenced before the plaintiffs in ejectment had regained possession—and therefore before *they* could have maintained a suit for mesne profits—was therefore not well taken.

Judgment affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 2.

[Filed April 7, 1880.]

[No. 6486.]

HARDEN, APPELLANT, vs. WARE, RESPONDENT.

ACTION UPON NOTE SECURED BY MORTGAGE—FORM OF JUDGMENT. Where a suit is brought upon a promissory note in the ordinary form of such actions, and the answer does not deny the allegations, but alleges as defense that the note is secured by a mortgage, under the provisions of Chapter I, Title 10, of the Code of Civil Procedure the plaintiff is entitled to a judgment; and the Court may direct the sale of the incumbered property, notwithstanding such order was not prayed for by the complaint.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

J. C. Bates, for appellant.

Chas. H. Phelps, for respondent.

SHARPSTEIN J., delivered the opinion of the Court:

The defendant in his answer does not deny any of the allegations of the complaint, which is in the ordinary form of one upon a promissory note. But it is alleged in the answer that the note sued upon is secured by a mortgage bearing even date therewith, executed by the defendant to the plaintiff upon real estate, which is particularly described in the answer. A copy of the mortgage is annexed to the answer, and made a part thereof. It was recorded on the day of its execution; and the defendant alleges that it has never been foreclosed, released, transferred, or abandoned. The Court found that the defendant made and delivered the

note as alleged in the complaint; that the plaintiff was the lawful owner and holder thereof; that no part of the principal or interest had been paid; and that at the date of said findings there was due to the plaintiff on it the sum of $3,014. And the Court found that all the allegations of the answer in respect of the execution of a mortgage as security for the payment of said note were true. As a conclusion of law, the Court found that the plaintiff held a mortgage upon real estate to secure the payment of the note, which is a "debt" within the meaning of section 726 of the Code of Civil Procedure, and as such must be recovered in an action of foreclosure; and ordered judgment to be entered for the defendant.

If the defendant had not set up the mortgage in his answer, the plaintiff would have been entitled, upon the findings of the Court upon the other facts, to a judgment for the amount which he claimed in his complaint. And before the enactment of section 723, C. C. P., or any statute embodying a similar provision, the existence of the mortgage would not have affected his right to recover upon the note in an action at law. The section of the Code above referred to provides that "there can be but one action for the recovery of any debt * * * secured by mortgage upon real estate, * * * which action must be in accordance with this chapter." (Chap. 1, Title 10.) "In such action the Court may by its judgment direct a sale of the incumbered property (or so much thereof as may be necessary), and the application of the proceedings of the sale to the payment" of costs, expenses, "and the amount due to the plaintiff." The judgment in such a case must be the ordinary one of foreclosure.

The exact meaning of the section is not quite clear to our comprehension. For instance, when it says that the "action must be in accordance with the provisions of this chapter," and then omits to state anything in regard to the form of the action or the proceeding in it until the stage is reached where it becomes necessary to render a judgment, the intention of the Legislature is not plainly apparent. In the case before us, "but one action" has been brought for the recovery of debt. To that extent, at least, the case is within the provision of the Code above cited. Now, if in this action a judgment can be rendered upon the allegations of the parties which will be in strict accordance with that provision of the Code, we know of no valid reason why it should not be done. There is no controversy as to the right of the plaintiff to recover, in some form of action, the sum for which he

demands judgment. Conceding, then, that the only judgment to which he is entitled upon the allegations contained in the answer is one in conformity with the provisions of the Code bearing upon this question, why is he not entitled to a judgment in that form? It is true that neither party demands such a judgment. But in any case in which an answer is filed, the Court may grant to a plaintiff "any relief consistent with the case made by the complaint and embraced within the issue." (C. C. P., section 580.) If there be no answer, the relief granted to the plaintiff "cannot exceed that which he shall have demanded in his complaint." (*Id.*) This clearly implies that whenever it is shown by an answer that the plaintiff is entitled to relief in excess of that which he demands in his complaint, if embraced within the issue, he shall have it. Now the plaintiff in this case, as before stated, was entitled, upon his own allegations, to a judgment; and the answer simply shows that the judgment should differ only in form from that which is demanded in the complaint. In other words, the defendant should obtain all the relief to which his answer shows him entitled, under the law interpreted as he insists it should be, by having a judgment entered for the amount demanded by the plaintiff, containing a direction for the "sale of the incumbered property," etc. We think that it would be doing no violence to the provision of section 726 of the Code to construe it as if it read as follows: "There can be but one action for the recovery of any debt secured by mortgage; and whenever it appears by the pleadings or proofs in a case that the plaintiff is entitled to recover a judgment upon a debt so secured, the Court may by its judgment direct the sale of the incumbered property," etc. It seems to us that this would satisfy every requirement of that section. As Comstock, J., says, in *Emery* vs. *Pease*, 20 N. Y. 64: "This is probably not the view in which the suit is brought, nor is it in accordance with the prayer of the complaint; but relief is to be given consistent with the facts stated, although it be not the relief specifically demanded. (Code, sec. 275.) And in determining whether an action will lie, the courts are to have no regard to the old distinction between legal and equitable remedies. Those distinctions are expressly abolished. (Code, sec. 69.) A suit does not, as formerly, fail because the plaintiff has made a mistake as to the form of the remedy." It is unnecessary to state that our own Code in this respect is substantially the same as that of New York. Of course we do not mean to be understood as holding that the plaintiff, upon the allegations of his complaint in the absence of those of the answer,

would be entitled to a judgment of foreclosure. But what we do mean is, that the answer shows beyond any doubt that the plaintiff is entitled to such a judgment, and that such a judgment would not be inconsistent with the case made by the complaint, and that it is embraced within the issue. Whether the judgment be in the form demanded by the complaint, or in the form which the answer requires that it should be, the plaintiff recovers upon the note sued on; and the only difference is, that in the latter case the judgment directs that recourse shall first be had to the incumbered property for its satisfaction. Beyond that the two judgments would be essentially the same. Besides, we do not think that the allegations of the answer constitute either a good plea in bar or in abatement. We do think, however, that the defendant is entitled to have a judgment rendered in accordance with the case which he makes; and that is all that he can equitably claim. As the statute upon which he relies does not attempt to prescribe the form of action, but does prescribe, in clear and unambiguous language, the form of judgment in a case like that which his answer presents, and as that answer is found by the Court to be true, it would seem to follow that the defendant is only entitled to the relief which his answer shows him entitled to. It must be borne in mind, however, that this conclusion is largely based upon the fact that, before the enactment of any statute upon this subject, the plaintiff would have been entitled to the judgment demanded in his complaint, and that the matters alleged in the answer of the defendant would have been wholly irrelevant; and we are not permitted to presume that by the enactment of that statute the Legislature contemplated any greater change in the law as it before existed than is clearly expressed in the Act by which the change is wrought. As before stated, the only change expressly made in the law applicable to this case is as to the form of the judgment. In that respect the Code relating to the subject must be complied with, and with that in view we make the following order:

Judgment reversed, and cause remanded to the Superior Court of the city and county of San Francisco, with directions to enter a judgment upon the findings in favor of the plaintiff for the amount therein found to be due him upon the note sued on, together with interest which has since accrued and costs; and that in all other respects said judgment be made to conform to the provisions of Chapter 1, of Title 10, of the Code of Civil Procedure.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 2.

[Filed April 21, 1880.]

[No. 6670.]

REMINGTON, RESPONDENT, vs. HIGGINS, APPELLANT.

EQUITABLE MORTGAGES--MISTAKES OF LAW—RELIEF IN EQUITY. Where the husband, under an agreement to purchase lands, took the title in the name of his wife, and agreed that a mortgage should be given for the unpaid balance of the purchase money, and in pursuance of that agreement the wife, at the request of the husband, executed a paper intended to be a mortgage, but which in law is not such, it should be treated as an equitable mortgage; and a court of equity will carry out the agreement and intention of the parties.

Appeal from the District Court of the First Judicial District, Ventura County.

Hall & Hatch and *Robinson & Bledsoe*, for respondent.

A. W. Thompson and *Williams & Williams*, for appellant.

MYRICK, J., delivered the opinion of the Court:

An agreement was made between plaintiff and defendant C. P. Higgins for the purchase from plaintiff of a parcel of land at the price of $1,200—$300 to be paid in hand, and the payment of the balance to be secured by mortgage on the premises. At the request of C. P. Higgins, plaintiff executed a deed of the premises to A. J. Higgins, wife of C. P. Higgins, the latter of whom paid the $300 as agreed, and the wife executed promissory notes for the balance and a mortgage of the lands to secure the payment of the same. The husband did not join in the execution of the notes or mortgage, but they were executed at his request and in pursuance of the agreement between himself and plaintiff. Both husband and wife took possession of the land, and have ever since occupied it. Subsequently the husband paid $108 interest on the debt. The balance not having been paid, plaintiff brings his action for a foreclosure. The defendant Meredith is a junior incumbrancer with full notice.

The defense is, that by the conveyance to the wife the property became the community property of the husband and wife; that under section 167 of the Civil Code, which provides that the community property is not liable for the contracts of the wife, the mortgage is void; that plaintiff might have had a vendor's lien, but he waived it by taking the notes and mortgage, even though the mortgage be void; that this is not a case for a court of equity to give relief by holding the existence of an equitable mortgage, for the reason that there was no mistake of fact, but a mistake of law; and plaintiff, having by mistakes of law taken what he supposed to be a

valid mortgage, but is not, he is now bound by that mistake, and must abide the consequences.

Admitting that the transaction did not create a mortgage in law, and not deciding but that plaintiff may have waived his lien as a vendor, we are of opinion that plaintiff has a lien upon the premises by way of equitable mortgage to secure the unpaid portion of the purchase money and interest. The husband, in bargaining for the premises, agreed that a mortgage should be given. A paper was executed in pursuance of that agreement, which was supposed by the parties to have accomplished that object. It now appears that that paper is invalid as a mortgage. Equity will treat that as done which the parties agreed to have done, and which ought to have been done. This Court decided, in *Love* vs. *S. N. L. W. & M. Co.*, 32 Cal. 639, that a mistake of law as well as of fact will be considered, and the parties relieved from its consequences. Reference may also be made to *Daggett* vs. *Rankin*, 31 Cal. 321, and *Raceuillat* vs. *Sansevain*, 32 Cal. 389, where the doctrince of equitable mortgages is recognized and sustained.

Our view that this should be treated as an equitable mortgage is based upon the facts that the husband, in bargaining for the land, agreed that a mortgage should be given for the unpaid portion of the purchase money; in pursuance of that agreement, the wife, at the request of the husband, executed a paper intended to be a mortgage, but which in law is not such; and that a court of equity will, under such circumstances, carry out the agreement and intention of the parties.

Plaintiff had judgment in the Court below for a sale of the premises in aid of the lien. Defendants moved for a new trial, which was denied; defendants appealed. Judgment and order affirmed.

We concur: Morrison, C. J., Thornton, J.

CONCURRING OPINION.

If the wife, who received the conveyance and executed the notes and mortgage, had been capable of executing a valid mortgage upon the premises, and had failed to do so through defective execution, there would be no difficulty in holding the mortgage so executed to be an equitable mortgage. But that is not this case. Here the wife had no legal or equitable title to the land, and could not execute a valid mortgage upon it; and as the instrument which she did execute was void, I do not think that it constituted a waiver of the plaintiff's right to a vendor's lien upon the premises for the unpaid purchase money. (*Davis* vs. *Cox*, 6 Ind. 484.)

Under our Code the effect of the plaintiff's deed was the

same as if it had been executed to the husband; and the transaction must be treated as it would be if the land had been conveyed to him, and his wife had executed a mortgage upon it to secure the payment of the purchase money. She purchased nothing, obtained no title to anything, and gave no security for the payment of anything. Under the circumstances, it seems to me that she might, with perfect propriety, be left out of view altogether, and the case be considered as one in which the husband purchased the land, acquired the title, paid a part of the purchase money, and gave no security for the payment of the balance.

If the plaintiff has done any act manifesting an intention not to rely upon the land for security, his claim to a vendor's lien cannot be maintained. But the facts as found by the Court satisfy me that the plaintiff throughout manifested an intention to rely upon the land as security for the payment of the purchase money for which credit was given. The very instrument which it is claimed constituted a waiver of the vendor's lien purports to be a mortgage upon the land sold by the plaintiff. Besides, the Court finds that it was agreed between the vendor and the vendee that the payment of so much of the purchase money as was not paid at the time of the execution of the conveyance should be secured by a mortgage upon the land conveyed. No such mortgage was ever executed; but the agreement to execute it on the one side, and to accept it on the other, shows that it was the intention of the vendor to rely upon the land for security.

As it was said in *Dunghaday* vs. *Paine*, 6 Minn. 304: "A vendor taking security upon the land sold does not therefore, by that act, waive his equitable lien; provided that he has expressly agreed with the purchaser that it shall be retained. Where such agreement has been made, the lien will attach to the property in the hands of the vendee and all persons claiming under him, with notice of the agreement."

The prevailing rule undoubtedly is that the acceptance of a distinct and separate security for the purchase money is *prima facie* a waiver of the vendor's lien; but it is only *prima facie* evidence of it, and may be rebutted. If there is anything in this case which tends to prove that the vendor ever intended to waive his security upon the land for the payment of the unpaid purchase money, it has not been brought to my attention.

As the result, so far as this case is concerned, is the same, whether these or the views of the majority of the members of the Court be correct, I concur in the judgment affirming that of the Court below. SHARPSTEIN, J.

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Plaintiff had judgment in the Court below for a sale of the premises in aid of the lien. Defendants moved for a new trial, which was denied; defendants appealed. Judgment and order affirmed.

We concur: Morrison, C. J., Thornton, J.

CONCURRING OPINION.

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As the result, so far as this case is concerned, is the same, whether these or the views of the majority of the members of the Court be correct, I concur in the judgment affirming that of the Court below. SHARPSTEIN, J.

DEPARTMENT NO. 1.

[Filed April 22, 1880.]

[No. 6150.]

THE PEOPLE OF THE STATE OF CALIFORNIA, APPELLANT.

VS.

HOUSTON, RESPONDENT.

RECLAMATION DISTRICT—DISCRETION OF TRUSTEES—UNCONSTITUTIONAL ATTEMPT TO LEVY ASSESSMENT. The trustees of a reclamation district, representing the owners of the land therein, are bound by the general law to exercise their best judgment and discretion in ascertaining and reporting as a basis for assessments the actual cost of reclamation; and an Act of the Legislature which attempts to substitute for such discretion the books and vouchers of the district as the basis of an assessment, is unconstitutional, being in effect an attempt by the Legislature to levy an assessment.

Appeal from the District Court of the Fifteenth Judicial District, Contra Costa County.

P. G. Gulpin and *F. M. Warncastle*, for appellant.

James A. Waymire, for respondent.

Ross, J., delivered the opinion of the Court:

Action commenced October 20, 1876, in the name of the People of the State of California, to collect an alleged delinquent assessment upon certain lands situated within Swamp Land Reclamation District No. 118, levied under and pursuant to an Act of the Legislature passed March 6, 1876, entitled "An Act relative to the assessment in Swamp Land Reclamation District number one hundred and eighteen, in Contra Costa County." The district was organized under the Act of March 28, 1868. The Court below sustained a demurrer to the complaint; and the plaintiff declining to amend, final judgment was entered for defendants, from which this appeal is taken.

The principal question in the case relates to the validity of the said Act of March 6, 1876, the first section of which is as follows:

"The trustees of Reclamation District No. 118 are hereby authorized and directed to make up a sworn statement in detail of the total cost and incidental expenses of the work of reclamation in the said district, *based upon the books and vouchers thereof*, and to *report* the same to the Board of Supervisors of Contra Costa County; and thereupon the said board must appoint three commissioners, disinterested persons, residents of said county, who must proceed forth-

with to view and assess on the lands of said district *the whole amount so reported*, in proportion to the benefits which have resulted or will result thereto from said work and incidental expenses."

Section 2 provides that a "list of the charges assessed against each tract of land must be made out and filed by the commissioners, and shall be a lien on said land and become delinquent and be collected and disbursed in the manner provided in Article XI, Chapter 1, Title VIII, Part 3 of the Political Code." And by section 3 it is provided that "the assessment to be levied under the provisions of this Act shall supersede all former assessments levied in said district," etc.

The general law in existence at the time of and since the passage of this Act—and which, so far as the questions in this case are concerned, is substantially the same as the Act of March 28, 1868—provides that after the approval by the Board of Supervisors of the petition for the formation of the district, the petitioners, or a majority of them, "may make by-laws for the management of the district, and must elect three persons owning land in the district to act as a Board of Trustees thereof, who shall keep their office in the district, or as near as practicable, for the transaction of all business pertaining to the reclamation of the district, and their books and papers shall be open to inspection by any one person interested at all times." (Political Code, sec. 3452.) By section 3454 the Board of Trustees are given power "to employ engineers to survey, plan, locate, and estimate the cost of the work necessary for reclamation," etc. And section 3455 provides that they "must report to the Board of Supervisors of the county * * * the plans of the work and estimates of the cost, together with estimates of the incidental expenses of superintendence, repairs," etc. The next section (3456) makes it the duty of the Board of Supervisors to appoint three commissioners, "who must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works." The commissioners are then required to make a list containing—(1) a description of each tract assessed; (2) the number of acres in each tract; (3) the name of the owner of each tract if known, and if unknown, that fact; and (4) the amount of the charge assessed against each tract. (Sec. 3461.) The list so made must be filed with the County Treasurer, and from and after it is filed the charges assessed become a lien upon the land. (Sec. 3461–2.) And if the assessments are not paid within

thirty days, the District Attorney is required to commence suit to enforce payment, and when collected he must pay the money to the County Treasurer, who must place the same to the credit of the district. (Sec. 3466.)

Under these general provisions of the law, the land owners are permitted to organize a district for the purpose of securing the reclamation of the land situated within its limits. They are required to select three trustees from their number, whose duty it is to plan the necessary works, to estimate the cost, and to report to the Board of Supervisors the amount of money required for the purpose. Upon the result of their investigation and judgment the assessment is based. They are selected, or should be, with special reference to their fitness to discharge this important duty; and those who have to pay for the work are entitled to the benefit of the investigation and discretion of the trustees, to the end that the plans suggested may be the best, and the cost of the work reasonable and proper. When all of the steps thus required by the statute have been taken, the amount assessed upon the respective tracts becomes a lien thereon, and not until then. The Act in question, however, attempts to deprive the property owners of all the benefits conferred by the law under which the district was organized and the trustees elected, and in terms directs the latter to make up a sworn statement of the total cost and incidental expenses of the work of reclamation in the district, *based upon the books and vouchers thereof*, and to report the amount to the Board of Supervisors; and further declares that the board must thereupon appoint three commissioners, who must proceed forthwith to view and assess on the lands of the district *the whole amount so reported*, in proportion to the benefits, etc.

According to this Act, the amount assessed must be the amount the trustees are required to report; and this amount they are required to ascertain by making a statement of the total cost and incidental expenses of the work, *based upon the books and vouchers* of the district. In other words, the books and vouchers are by this Act declared to be the foundation of the statement—that upon which it must rest. To ascertain the total amount from such a basis would require a mere mathematical calculation, calling for and admitting of no question as to the *correctness* of the books or vouchers, or of the charges contained in them, and would take from the trustees all discretion in the premises.

It is in effect nothing more nor less than an attempt by the Legislature to levy an assessment upon the lands of the district—the amount being the sum total shown by the books

and vouchers, without any reference to the nature or character of the charges in the books, and irrespective of any question as to whether the law authorizing and providing for the work has been complied with.

The Constitution admitted of no such legislation. (*People* vs. *Lynch*, 51 Cal. 34; *Brady* vs. *King*, 53 Cal. 44; *Taylor* vs. *Palmer*, 31 Cal. 252.)

Indeed, it is not claimed that the provisions of the general law were in any respect complied with; but the action is based entirely upon the Act of March 6, 1876.

Other objections are made to this Act, but we deem it unnecessary to notice them, as the view already taken disposes of the case.

Judgment affirmed.

We concur: McKinstry, J., KcKee, J.

DEPARTMENT NO. 2.

[Filed April 20, 1880.]

[No. 6412.]

OULD, APPELLANT, VS. STODDARD, RESPONDENT.

ACTION UPON NOTE SECURED BY MORTGAGE—SECURITY WAIVED—SECTION 726, C. C. P., CONSTRUED. Section 726, C. C. P., permits but one action for the recovery of a debt secured by mortgage. So where an action upon a note secured by a mortgage has been prosecuted to final judgment, the plaintiff has exhausted his remedy upon both the note and the mortgage; and a subsequent action to foreclose the mortgage cannot be maintained.

Appeal from the District Court of the First Judicial District, Santa Barbara County.

Charles Fernald, for appellant.

Richards & Boyce, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal from a judgment in favor of the defendants in an action to foreclose a mortgage executed by the defendants, who are husband and wife, to secure the payment of a promissory note made by the husband alone.

The only defense is, that before the commencement of this action the plaintiff brought an action and obtained a judgment upon the note against the maker in a court of competent jurisdiction in the State of Ohio. No part of the sum recovered in that judgment has been paid, and an execution issued upon it was returned wholly unsatisfied. The Court below found, as a conclusion of law, that by proceeding in said action at law upon the note alone, the plaintiff waived

his security, and cannot maintain this action for the enforcement of it.

Although the statutes of this State since 1860 have contained a provision substantially like that of the Code upon which the respondent relies, the precise question raised in this case has never been passed upon by this Court That provision has been referred to and commented upon in several cases, but the question involved in this case did not arise in any of them. For that reason the solution of the question which has to be determined in this case cannot be materially facilitated by any reference to those cases.

The note upon which the former action was brought and judgment obtained constituted a debt that was secured by the mortgage which the plaintiff seeks to foreclose in this action; and section 726, C. C. P., provides that "there can be but one action for the recovery of any debt * * * secured by mortgage." Unless it can be held that this action is not for the recovery of the debt secured by the mortgage, it necessarily follows that it connot be maintained. There has been one action for the recovery of that debt, which culminated in a judgment before this action was commenced; and the law says that there can be but one action for the recovery of a debt so secured. The plaintiff might have brought an action for the recovery of the debt, and demanded and obtained in it all the relief that he demands in this action. By electing to bring an action upon the note alone, did he not waive his security? It is generally conceded that the obvious intention of the Legislature, in enacting the statute under consideration, was to prevent a multiplicity of suits upon transactions of this character. The right to bring an action of ejectment upon a mortgage had been taken away before the enactment of this statute; and if the object of the latter enactment is not to limit a mortgagee to a single action for the recovery of a debt, and the foreclosure of the mortgage by which it is secured, it would seem to be objectless. If a suit can be maintained upon a note, and another upon the mortgage by which it is secured, then no change has been effected in the law by this enactment, because a mortgagee was previously limited to those two actions. The law now in force provides for a single action in which a mortgagee can secure all that he could formerly secure by two actions, and the necessity of two actions is therefore entirely obviated.

It is not difficult to discover the policy which dictated the enactment of this statute. The tendency of modern legislation is to prevent a multiplicity of suits, and no one doubts

the wisdom of it. In order to give to this statute the force and effect which the Legislature intended it should have, we must hold that, by prosecuting an action upon the note secured by the mortgage to final judgment, the plaintiff has exhausted his remedy upon both the note and the security. To hold otherwise would be to hold that there may be two actions where the statute declares there can be but one.

Judgment affirmed.

We concur: Thornton, J., Myrick J,.

DEPARTMENT No. 2.

[Filed April 7, 1880.]

[No. 7008.]

SPINETTI, RESPONDENT,

vs.

BRIGNARDELLO, APPELLANT.

EFFECT OF DISMISSAL OF APPEAL. The dismissal of an appeal for failure to serve or file a transcript within the time prescribed by law is in effect an affirmance of the judgment, unless the dismissal is expressly made without prejudice to another appeal; and where the order of dismissal does not state that it is without prejudice to another appeal, no subsequent appeal can be taken.

Appeal from the District Court of the Ninteenth Judicial District, San Francisco County.

J. F. Cowdery, for respondent.

S. L. Rogers and *A. D. Splivalo*, for appellant.

By the Court:

This is a motion to dismiss an appeal. The judgment in the Court below was entered January 28, 1879. On the following day defendants gave notice of appeal. July 14, 1879, the appeal was dismissed by this Court on the ground that no transcript was served or filed within the time prescribed by law. The order of dismissal did not state that it was without prejudice to another appeal. December 27, 1879, defendant C. R. Splivalo gave notice of appeal, and the transcript was filed February 24, 1880. The motion is to dismiss the last appeal.

Section 954, C. C. P., provides for dismissing an appeal for failure to furnish the requisite papers; and section 955 provides that the dismissal of an appeal is in effect an affirmance of the judgment, unless the dismissal is expressly made without prejudice to another appeal.

The judgment being thus declared by the law to be affirmed, no subsequent appeal can be taken.

The motion is granted.

DEPARTMENT No. 2.

[Filed April 7, 1880.]

[No. 6378.]

McLAUGHLIN, RESPONDENT, vs. DOHERTY, APPELLANT.

ENTRY OF JUDGMENT—DISTINCTION BETWEEN ENTRY AND RENDITION. A judgment is *rendered* when ordered by the Court, and *entered* when actually entered in the Judgment Book.

APPEAL—DISMISSAL OF. Section 939 of the Code of Civil Procedure provides that an appeal may be taken from a final judgment within one year *after* the *entry*. So that where a notice of appeal was filed on October 17th, the order for judgment having been made on the 7th day of October, but the judgment not entered until October 29th, the appeal was taken *before* and not *after* the entry, and must be dismissed.

Appeal from the District Court of the Twenty-third Judicial District, San Francisco County.

T. R. Wise, for respondent.

Wm. M. Pierson and *W. W. Cross*, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The notice of appeal in this case was served and filed on the 17th day of October, 1878. The order for judgment was made on the 7th day of October, 1878, but the judgment was not entered until the 29th day of October, 1878, or twelve days after the service of the notice of appeal.

Section 939 of the Code of Civil Procedure provides that "an appeal may be taken from a final judgment * * within one year after the entry of the judgment." This appeal is from a final judgment. Prior to the adoption of the Code, section 336 of the Practice Act authorized an appeal to be taken from a final judgment "within one year after the *rendition* of the judgment." In *Gray* vs. *Palmer*, 28 Cal. 416, this provision of the Practice Act was before this Court for a construction, and the Court in its opinion defined with precision and minuteness the distinction between the *rendition* and the *entry* of a final judgment within the meaning of that Act. The distinction which the Court drew between the two was, that a judgment is *rendered* when ordered by the Court, and *entered* when actually entered in the Judgment Book. "We cannot," says the Court, "resist the conclusion that the terms 'rendition' and 'entry' are used in different senses, and to express the idea appropriate to those words respectively." This decision was cited and approved afterwards in many other cases by the same Court before the enactment of the Code.

The Legislature must be presumed to have been familiar with these decisions and to have had them in view when it

changed the clause as above stated. It adopted the definitions which the Court had given to the two words by substituting one for the other. It in effect enacted that thereafter an appeal must be taken within one year after the *entry* instead of within one year after the *rendition* of a judgment, and that both the "entry" and "rendition" of a judgment had been correctly defined by this Court.

Unless we hold that the words "rendition" and "entry" mean one and the same thing, we must fix upon one or the other as the time after which an appeal may be taken. If a judgment is "entered" when "rendered" within the meaning of the Code, then this appeal was taken after the *entry* of the judgment; otherwise not. Section 936, C. C. P., provides that "a judgment or order in a civil action, except when expressly made final by this Code, may be reviewed as prescribed in this Title, *and not otherwise*." One of the requirements of that Title is that an appeal be taken "within one year after the *entry* of the judgment." If we are correct in our view of what constitutes an entry of a judgment, this appeal was taken *before* and not *after* the *entry*, and therefore must be dismissed.

Appeal dismissed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT NO. 1.

[Filed April 17, 1880.]

[No. 6028.]

JEWELL, APPELLANT, vs. MCKENLEY, RESPONDENT.

SEE PARROTT VS. FLOYD, *vide* PAGE 333.

Appeal from the District Court of the Fourth Judicicial District, San Francisco County.

O. P. Evans and *Alfred Wheeler*, for appellant.

H. H. Haight, for respondent.

By the Court:

To determine the questions argued in the briefs of counsel would be to determine the cause on the merits in advance of the trial. This, as the case is presented, we think we ought not to do. We therefore express no opinion as to the validity or invalidity of the ordinance under which the defendants seek to justify their obstruction of the street in question, but upon the authority of *Parrott* vs. *Floyd*, No. 6043, affirm the order.

Order affirmed.

DEPARTMENT No. 1.

[Filed April 6, 1880.]

[No. 6407.]

McCOOL, RESPONDENT, vs. MAHONEY, APPELLANT.

MALICIOUS PROSECUTION—JUDGMENT—DAMAGES AGAINST TWO OR MORE CANNOT BE SEVERED. Where two or more defendants are sued jointly for malicious arrest and prosecution, the defendants answering separately, the action being for a wrong in which both defendants joined, it is error to sever the damages and so enter the judgment.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Fred Hall and *J. M. Burnett*, for appellant.

B. S. Brooks, for respondent.

Ross, J., delivered the opinion of the Court:

Plaintiff sued defendants jointly for malicious arrest and prosecution. The defendants answered separately. The cause was tried with a jury, and this verdict was returned: "We, the jury in the above entitled action, find for plaintiff against Mahoney $3,000, and against Small $500." Judgment was thereupon rendered that plaintiff recover from Mahoney $3,000, of Small $500, and of Mahoney and Small $282.75 costs of suit. The defendants made a motion for a new trial, which was denied, and appealed from the judgment and the order denying them a new trial.

After the argument of the cause here, the plaintiff asked leave to enter a *nolle prosequi* as to Small, and to consent that *as to him* the judgment be vacated and the suit dismissed. If this motion should be allowed, it is not at all clear—in view of the nature of the action and the peculiar form of the judgment—but that it would operate as a discharge of both defendants. (*Minor* vs. *Mechanics' Bank*, 1 Peters, 87.) And we thinkit fairer to all of the parties to deny the application, and to determine the cause as presented by the original record.

The judgment as entered is clearly erroneous. The action being for a wrong in which both defendants joined, the damages could not be severed. (*Beal* vs. *Finch*, 11 N. Y. 128, *Halsey* vs. *Woodruf*, 9 Pick. 555; *O'Shea* vs. *Kirker*, 8 Abb. Pr. 69; *Bohun* vs. *Taylor*, 6 Cow. 312; *Minor* vs. *Mechanics' Bank*, 1 Peters, 74; *Layman* vs. *Hendrix*, 1 Ala. 212; *Hardy* vs. *Thomas*, 23 Miss. 544; *Riley* vs. *McGee*, 1 A. K. Marsh, 321; *Salmons* vs. *Smith*, 1 Saund. R. 207, note 2.)

As this view renders it necessary to remand the cause for

a new trial, it becomes unnecessary to notice the other points made by counsel for appellants.

Motion to enter *nolle prosequi* as to Small denied, and judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed April 17, 1880.]

[No. 6043.]

PARROTT, APPELLANT, vs. FLOYD, RESPONDENT.

INJUNCTION, DISSOLUTION OF—PRACTICE—ABUSE OF DISCRETION. The dissolution or continuing in force of a preliminary dissolution is a matter largely within the judicial discretion of the Court below, and its action will not be interfered with by the Appellate Court unless there has been an abuse of discretion.

Appeal from the District Court of the Nineteenth Judicial District, San Francisco County.

McAllister & Bergin, for appellant.

W. W. Cope, for respondent.

ROSS, J., delivered the opinion of the Court:

Upon the filing of the complaint in this action, a preliminary injunction was issued. The defendants answered, denying all of the equities of the complaint, and afterwards moved to dissolve the injunction, basing the motion upon the complaint, answer, and affidavits. At the hearing the plaintiff filed counter affidavits. The affidavits filed by plaintiff supported some of the averments of the complaint, and those filed by defendants supported some of the denials of the answer. The Court below, after full hearing and consideration, made an order dissolving the injunction, and from that order this appeal is taken.

Inasmuch as the dissolution or continuing in force of a preliminary injunction is a matter largely within the judicial discretion of the Court below, the settled rule in such cases is, that this Court will not interfere with the action of the lower Court unless there has been an abuse of discretion. (*Rogers* vs. *Tenant*, 45 Cal. 186; *McCreery* vs. *Brown*, 42 Cal. 457; *Godey* vs. *Godey*, 39 Cal. 166.)

After a careful examination of the record in this cause, we discover no abuse of discretion in the dissolution of the preliminary injunction. The order is therefore affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed April 22, 1880.]

[No. 6872.]

JAMES McFADDEN, APPELLANT,

vs.

H. M. MITCHELL, RESPONDENT.

FRAUDULENT TRANSFER—FRAUDLENT INTENT NOT PRESUMED FROM LACK OF CONSIDERATION. By section 3442, C. C., the question of fraudulent intent under section 3440 is one of fact and not of law, and the transfer of personal property cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. It was error, therefore, to instruct the jury—"If you find from the evidence that there was no good or valuable consideration from M. to A, for the alleged transfer of cattle, then you are instructed that such transfer was and is void as against the creditors of A."

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Brunson & Wells and *Bicknell & White*, for appellant.

Thom & Ross, for respondent.

McKEE, J., delivered the opinion of the Court:

It was error in the Court below to instruct the jury as follows: "If you find from the evidence that there was no good or valuable consideration from McFadden to Allen for the alleged transfer of the cattle, then you are instructed that such transfer was and is void as against the creditors of Allen."

By section 3442 of the Civil Code it is declared that the question of fraudulent intent, arising under the provisions of Title II, section 3440 of the Code, is one of fact and not of law; and that any transfer or charge of personal property cannot be adjudged fraudulent solely on the ground that it was not made for a valuable consideration. Under this section it has been held that a gift by an insolvent debtor of a policy of life insurance could not be adjudged fraudulent against creditors solely on the ground that the consideration was inadequate and the donor insolvent. Inadequacy of price and insolvency of a debtor may be circumstances more or less potential in the determination of fraud as a question of fact; but failure of consideration is not, in itself, sufficient to justify a court in finding fraud as matter of law. (*Jamison* vs. *King*, 50 Cal. 133.) And in *Harris* vs. *Burns*, *Id.* 140, it was held error to instruct a jury that a sale by an insolvent debtor of all his goods, with credit for the greater portion of the purchase money, was conclusive evidence of an intent to hinder, delay, and defraud his creditors.

In the case in hand the Court below told the jury, in substance, that the single fact of want of consideration was, as matter of law, conclusive evidence of fraud in the transfer in controversy as against the creditors of Allen.

A kindred error is found in the last portion of the fifth instruction, in which the Court told the jury, on behalf of the defendant, that "the property must bear a reasonable proportion to the preferred debt." This, for the reasons already stated, was objectionable. By these instructions the Court in effect took away from the jury the consideration of fraudulent intent as a question of fact; and as they are contrary to the plain rule established by the Code, the judgment and order denying the motion for a new trial must be reversed, and the cause remanded for a new trial.

So ordered.

We concur: McKinstry, J., Thornton, J.

DEPARTMENT NO. 2.

[Filed April 26, 1880.]

[No. 5821.]

ESTATE OF RADOVICH.

WILL—PAYMENT OF LEGACIES. Full payment of money legacies may be refused when it appears that it was the intention of the testator that said legacies should be paid from certain assets not sufficient for full payment, and certain annuities from others.

Appeal from the Probate Court of the city and county of San Francisco.

George W. Tyler, for appellant.

A. D. Splivalo, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an appeal from an order refusing to direct payment of a legacy. Testator made the following legacies: To his brother Biaggio Radovich, $1,000; his brother Antonia Radovich, $1,000 and two coffee stands; to his sister Angelica, $500; to his sister Annetta, $500; to Domingo Ghirardelli, $2,000, "to be by him expended and laid out for the education and welfare of my nephew Giovanni Radovich."

The will then contains the provisions:

"9th. It is my desire, and I so order it, that my debtors be not pressed, but that they be allowed by my executors reasonable time wherein to pay what is due on my estate.

"10th. It is my desire, and I so order it, that my executors deposit in some bank, or other secure place in the city

of San Francisco, all rents derived from the property I own in Virginia City, Nev., and all the rents and profits derived from my estate, and that the same be applied by them in the manner hereinafter mentioned.

"11th. It is my desire, and I so order it, that out of the aforesaid rents and profits my executors shall send to my mother, Marieta Radovich, $75 every six months during her lifetime for her maintenance.

"12th. It is my desire, and I so order it, that my executors shall give such education as they shall deem fit and proper to my nephews and nieces, children of Biaggio Radovich, and that all the expenses of said education be paid out of the rents and profits of my estate; and in the event that the same be not sufficient to meet said expenses, then I direct my executors to sell any portion of any real estate that may be necessary for the purpose.

"13th. After all the above gifts and bequests have been paid, after the annuities to my mother shall have ceased by her death, and after all the expenses of education of the children of my brother Biaggio shall have been paid, I give, devise, and bequeath the residue and remainder to my nephews and nieces, children of my brothers and sisters."

Said Ghirardelli and two others were named as executors.

Testator died December 24, 1869, leaving estate in this State; cash in the hands of said Ghirardelli, $10,564, and other property of the value of $2,850; real estate in Virginia City Nev., under lease. From the Virginia City property the executors have received $15,878.50 rents, and $3,500 insurance of one building. From property in this State they have received $2,670.48, about $2,500 being from Ghirardelli, who has become bankrupt, and under agreement with the co-executors his debt is being paid by installments. By the account of the executors rendered April 5, 1876, the balance of cash on hand was $9,741.49, consisting of the insurance money and rents from the Virginia City property. May 8, 1876, an order was made for the payment of fifty per cent. of the money legacies, which was received by all the legatees except Antonio. The latter insists upon the payment of the whole legacy to him, with interest from December 24, 1870, out of any moneys on hand; the executors claim that the insurance money should remain to erect a building in place of that which was burned, and that the rents are to remain, to be disposed of as provided in the tenth, eleventh, and twelfth clauses.

The Court below was of opinion that the evident intention of the testator was that the money legacies should look first

to the California assets for payment, and that the proceeds of the Virginia City property, at least for the present, should be reserved for the annuity to the mother and the education of the children of Biaggio. The Court continued in force the order to pay Antonio fifty per cent. of his legacy, and refused an order for further payment. We see no error in this.

Order affirmed.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed April 27, 1880.]

[No. 6795.]

FORSYTH, RESPONDENT, vs. BOWER, APPELLANT.

EXEMPT PROPERTY—HACKMAN. It is not necessary that a hackman should be actually using his hack at the very time of its seizure under execution to claim the benefits of the exemption laws; it is sufficient if he was engaged in that business as a means of livelihood, even though the hack was at the painter's undergoing repairs, and the horses temporarily pasturing.

INSTRUCTIONS. An instruction should be complete in itself.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

R. E. Arick, for respondent.

P. T. Colby and *V. A. Gregg*, for appellant.

By the Court:

The property involved in this controversy was claimed by plaintiff to be exempt from seizure by reason of his being a hackman, and using the same in his business as such. It was not necessary that he should have been actually using the property at the very time of the seizure; it was sufficient if he was engaged in the business as a means of livelihood, even though the horses were at the time at pasture temporarily, and the hack at the painter's undergoing repairs. The jury found that he was a hackman, habitually earning his living with the property, carrying passengers, and was using it at the time of the levy.

The points presented by the instructions asked for by the defendant were in fact passed upon and found by the jury; therefore defendant suffered nothing from the ruling of the Court, even if he had been entitled to the instructions, which is very doubtful, as the instructions asked for were too general, and might have misled the jury without further explanation. An instruction should be complete in itself.

Judgment and order affirmed.

Abstract of Recent Decisions.

OREGON SUPREME COURT.

JURY IN JUSTICE COURT. If a justice of the peace through inadvertance omits to swear a jury in the trial of an action before him, and the parties being present proceed with the trial of the cause without making any objection to the jury until after judgment is entered on the verdict, it is then too late for the party against whom it is rendered to question its validity on the ground that the jury was not sworn.—*Griffin* vs. *Pitman*, Feb. 17, 1880.

SETTING ASIDE JUDGMENT. After a justice of the peace has rendered a judgment on the verdict of a jury in a case tried before him, he has no authority to set aside such judgment and grant a new trial.—*Id.*

APPEARANCE IN JUSTICE COURT. Where the docket of a justice of the peace shows that he rendered judgment against a defendant for want of an answer without giving him an hour after the time specified in the summons in which to make his appearance, such judgment will be reversed on a writ of review.—*Gaunt* vs. *Perkins*, February 17, 1880.

TITLE IN EJECTMENT. In an action of ejectment, where the defendant merely traverses the allegations in the complaint and does not set up title in himself or another, the defendant will be confined in his testimony to such facts only as tend to show the weakness of the plaintiff's title.—*Phillippi* vs. *Thompson*, March 1, 1880.

COMPETENT EVIDENCE. And where the plaintiff in his evidence produces a confirmatory deed to establish his title, in which is recited other deeds by their dates through which plaintiff deraigns title, it is competent for defendant to offer in evidence and produce these deeds to show the boundaries of the land claimed by the plaintiff.—*Id.*

PRESUMPTION. A party entering land under color of title is presumed to enter and occupy according to his title.—*Id.*

CRIMINAL LAW—VIEW. During the trial of a person indicted for the crime of murder, an order was made by the Court, at the instance of the District Attorney, directing that the jury should have a view of the place where the homicide took place. The accused did not apply for leave to accompany the jury, and he was not present at the view. *Held*, that this was not a sufficient ground to reverse a judgment of conviction.—*State of Oregon* vs. *Lee*, March 1, 1880.

RELIGIOUS OPINIONS. No person is rendered incompetent as a witness in this State in consequence of his opinions on matters of religion.—*Id.*

DELIBERATION AND PREMEDITATION. It is not necessary that deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by direct and positive testimony. They may be inferred from proven facts in the case.—*Id.*

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Current Topics.

THE Supreme Court of the United States at its last term, in the case of *Bowman* vs. *Lewis et al*, held that the equality clause in the first section of the Fourteenth Amendment to the Constitution (viz., that which prohibits any State from denying to any person the equal protection of the laws) contemplates the protection of persons and classes of persons against unjust discriminations by a State; it has no reference to territorial or municipal arrangements made for different portions of a State. It was not intended to prevent a State from arranging and parceling out the jurisdiction of its several courts as it sees fit, either as to territorial limits or subject matter.

WE call attention to the case of *Wong Yung Quy on habeas corpus*, appearing in this issue. The opinion is by Judge SAWYER, of the Circuit Court of the United States for this district, Judge HOFFMAN, of the District Court, concurring. The case involves a construction of a statute of this State respecting the disinterment of Chinese. It is held that said statute does not violate any of the provisions of the Federal Constitution, nor any of the articles of the treaty with China; that the Act is a sanitary measure within the police powers of the State, and as such is valid.

Supreme Court of California.

DEPARTMENT NO. 2.

[Filed April 29, 1880.]

[No. 6528.]

WILSON, APPELLANT,

vs.

MADISON AND TULL, RESPONDENTS.

ACTION TO QUIET TITLE. In an action to quiet title the purchaser at constable's sale is entitled to recover as against a defendant who shows no title whatever in himself, but shows that the land in controversy is public land. A defendant under such circumstances cannot be allowed to set up the title in the United States.

MISRECITAL OF EXECUTION IN OFFICER'S DEED. A misrecital of the execution in the officer's deed will not affect the validity of the deed if the officer had authority to sell.

Appeal from the District Court of the Eighteenth Judicial District, San Diego County.

W. J. Gatewood, *A. B. Hotchkiss*, and *T. Slade*, for appellant.

Chase & Leach, for respondents.

THORNTON, J., delivered the opinion of the Court:

James Wilson sued the defendants in the District Court for the county of San Diego to quiet his title to a tract of land situate in that county. The defendant Madison answered and set up a cross-complaint, to which pleading last mentioned plaintiff filed an answer. The defendant Tull suffered a default. When the plaintiff rested his case on the complaint, on motion of defendant Madison, the Court ordered a nonsuit, and from the judgment of nonsuit plaintiff brings an appeal to this Court.

The case was tried by the Court, a jury having been waived; and the plaintiff, to sustain the issues on his part, introduced the following evidence: The record from a Justices' Court from Agua Caliente Township, county of San Diego, brought by one W. J. Gallaspy against A. Hatfield on a promissory note summons with return of service on defendant, demurrer of defendant by attorney, and a judgment in favor of plaintiff and against defendant for the sum of $28.50 and costs. This judgment was rendered and entered on the 6th of November, 1876; and on the same day, as appears from the testimony, an execution, in due form of law, was issued, which came to the hands of Thomas Bundy, Constable, on which the following return was made:

"Received on the within execution the sum of $78 25-100 for 3,600 pounds of potatoes, at ½ cent, bid in by D. D. Bailey; and for 267 bushels of charcoal, at 3 cents per bushel, bid in by D. D. Bailey; and for 20,900 pounds of hay, at ¼ cent per pound, bid in by W. N. Shaw. Received on the within execution $120 for the ranch advertised and sold to James Wilson on the 18th day of December, 1876. Total received on the execution, $198 25-100. Total amount due on the execution, $207 55-100. Balance due on the execution, $9 30-100. This the 10th day of December, 1876.

"THOS. BUNDY,
"Constable."

The plaintiff also offered in evidence a certificate of sale of the property in controversy issued to him by the constable, bearing date the 18th of December, 1876, and a deed executed by the same officer to him on the 21st of June, 1877. These two documents just mentioned contain the following recitals: That by virtue of an execution in the action above entitled (*Gallaspy* vs. *Hatfield*), tested the 18th day of December, 1876, by which he was commanded to make the amount of five dollars and 30-100, to satisfy the judgment in said action, with costs thereon, out of the personal property of A. Hatfield, the defendant in said action, and if sufficient personal property could not be found, then out of the real property belonging to said Hatfield, on the 6th day of November, 1876, or at any time thereafter, as by the said writ more fully appears, he has levied on and this day sold at public auction, according to the statutes, etc., to James Wilson, who was the highest bidder therefor, for $120, the real estate, describing it.

Thomas Bundy, the constable, was called, and testified that he levied the execution produced. The return to it was written according to his orders and instructions.

It is sufficient to say, without stating it here, that the testimony of Bundy, Monroe, Ijams, and the plaintiff, at least tended to show that the land levied on under execution, and conveyed by the deed, was the same land sued for.

It appears that the plaintiff, for the purpose of identifying the land sued for, with the lot sold under execution, offered in evidence a declaration of Homestead in the legal form by A. Hatfield, the defendant in execution.

The plaintiff rested, and defendant moved for a nonsuit, on the ground that the plaintiff had failed to show any title or right or interest in the property in controversy, and had failed to make a case upon which the Court could enter judgment in his favor. The Court granted the nonsuit, and

"assigned as a reason therefor that, allowing all the testimony offered on the part of the plaintiff, it appeared that he had no right, title, interest, or estate in the premises in controversy, as the title was in the United States Government, and therefore could not maintain this suit, and that it was unnecessary to determine the other points of the motion." The plaintiff excepted to the order granting a nonsuit, and appeals from the judgment entered upon it.

The Court erred in its ruling. We see no ground upon which the defendant could rely upon an outstanding title in the United States. He has shown no privity with Hatfield, the judgment debtor, or any title whatever. The legislation of this State from the beginning has treated such possessions as that of Hatfield as legal and vendible under execution, and has protected the title of the purchaser, regardless of the fact that the land in controversy is really public land. The statutes passed with that view have been in harmony with the legislation of the Congress of the United States. So far as the case proceeded on the trial, the Court could not see that the defendant was anything more than a mere trespasser. Under the circumstances he should not have been allowed to set up the title in the United States. The evidence admitted showed a case in which the plaintiff had a right to recover; and we cannot see, in any point of view, that the judgment of nonsuit can be sustained.

An objection is made that the execution is issued on the 6th day of November, 1876, and that it appears from the recital in the constable's deed that the sale was made under an execution issued on the 18th of December, 1876. This is obviously a mistake by the officer. The execution is identified by him in his testimony. There was but one execution produced on the trial. He, the officer, testified: "I levied the execution produced. * * I acted under the execution."

The execution was tested, and gave authority to sell; and it may be regarded as settled in this State that a misrecital of the execution in the officer's deed will not affect the validity of the deed if the officer had authority to sell. (*Blood* vs. *Light*, 38 Cal. 659; *Hunt* vs. *Loucks*, Id. 382.)

The return on the execution shows a sale by the constable. The deed recites a levy, which is sufficient. (*Blood* vs. *Light*, 38 Cal. 658, and cases there cited.) But, as was said in *Hunt* vs. *Loucks*, 38 Cal. 383, "Whether the return be good or bad, sufficient or insufficient, is a matter of no moment to the purchaser; for his title depends on it in no respect whatever." (*Ritter* vs. *Scannell*, 11 Cal. 238.)

A cross-complaint to quiet his title against plaintiff was

filed by defendant in this case, to which an answer was put in by plaintiff, and a motion was made by the plaintiff that the issues arising on the cross-complaint and answer to it be first tried. The Court refused, and to this plaintiff excepted.

We see no error under the circumstances of this case in such refusal. In fact, we can see no necessity for a cross-complaint. Issue was joined on title by the complaint of plaintiff and defendant's answer thereto; and if judgment passed for defendant, it would be an estoppel as to the title, which, under the rulings of the Supreme Courts of California, would protect the defendant as well as a decree in his favor.

Judgment reversed, and cause remanded for a new trial.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 1.

[Filed May 1, 1880.]

[No. 6942.]

O. S. WITHERBY, RESPONDENT,

vs.

CHARLES THOMAS, APPELLANT,

PRACTICE—CONFLICTING INSTRUCTIONS. Unless a party is prejudiced or a jury misled by apparently conflicting instructions, there is no ground for reversal.

EVIDENCE. Where there is a substantial conflict of evidence, the judgment of the lower Court will not be disturbed for the reason that it was contrary to the evidence.

Appeal from the District Court of the Eighteenth Judicial District, San Diego County.

Chase & Leach and *E. Parker*, for respondent.

G. H. & W. M. Smith, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

This is an action upon two promissory notes executed by defendant and payable to plaintiff. The execution of the notes is not denied, but defendant sets up in his amended answer and cross-complaint two contracts entered into between the parties to the action, one of which bears date of May 8, 1870, and the other the 26th day of August, 1875.

The first of these contracts recites that the party of the first part (plaintiff) has furnished and delivered 363 head of cows to the party of the second part (defendant) for the term

of five years, the same to be kept and taken care of by defendant, and at the expiration of the period of five years to be re-delivered to the plaintiff, "together with one-half of the increase."

The second contract, after referring to the first, and enumerating the number of cattle delivered the defendant thereunder, proceeds as follows: "And whereas, the term for which said stock was let having expired, both parties wish to renew the same contract and extend the time thereof: Now, therefore, it is hereby agreed between the parties hereto that the party of the second part shall keep and retain all of the original stock and the increase thereof now due from him to the party of the first part, for the term of five years from this date, or until the same are disposed of by the party of the first part, upon the same terms and conditions upon which the stock was originally taken—to-wit, for one-half the increase thereof—it being distinctly understood that the party of the first part has and retains the right at any and all times to sell any or all of the original stock, or any or all of its share of the increase thereof at his pleasure."

Several matters constituting counter-claims are set up in defendant's answer and cross-complaint, arising out of alleged sales by plaintiff of stock in which the defendant was interested as part owner, the payment of taxes, and other matters particularly set forth in the pleading. All of the matters contained in defendant's cross-complaint are fully answered and denied by the plaintiff. The jury found in favor of the plaintiff for the amount of the two promissory notes, with interest, and plaintiff had judgment therefor. Defendant made a motion for a new trial, which was denied; and this appeal is taken from the judgment and order of the Court below denying defendant's motion for a new trial.

First. The first point made on the appeal is that the verdict was contrary to the evidence. It is sufficient for the Court to say, in disposing of this point, that there was a substantial conflict in the evidence, and in such cases it is well settled that we will not disturb the verdict. The case was peculiarly one for the jury to pass upon, as it included many questions of fact, in relation to some of which the witnesses testified to *chances and probabilities* rather than to positive facts. This was notably so when witnesses were called on behalf of the plaintiff to testify to the probable rate of increase, and other witnesses were called on the part of the defendant to testify to the number of the cattle that had probably died.

Second. The second point made by defendant is that the

third instruction given by the Court was erroneous. The following was the instruction complained of:

"3. That the contract of August 26, 1875, was in effect a continuation of the contract of 1870 previously existing between the parties concerning said property, and you will examine said contract of 1870 in connection with that of 1875, and in reading them together will give to them the same effect as the first made would have had, had it been made for ten years, with the reservation to plaintiff of the right of sale of said property contained in said agreement of 1875, and that the defendant, under the agreement of 1875, was to keep and retain all of the original stock and the increase thereof that was due from the defendant to plaintiff for the term of five years upon the same terms and conditions upon which the stock was originally taken—to-wit, one-half of the increase thereof."

This instruction may be subject to criticism as being somewhat vague and possibly inconsistent; for it was not strictly accurate to say that the contract of 1875 was in effect a continuation of the contract of 1870. When the contract of 1870 was entered into there had been no increase, and each party was entitled to one-half of the increase thereafter accruing; but when the contract of 1875 was made, the defendant was entitled to *one-half of the increase existing at that time.* When therefore the contract of 1875 was made, the increase to be thereafter divided between the parties was not the increase of the entire stock, but simply the increase of the original stock and the increase of the one-half of the increase belonging to plaintiff. This may be gathered from the language of the instruction as the meaning of the Court, that the defendant, under the agreement of 1875, was to keep and retain all of the original stock and the increase thereof that was due from the defendant to the plaintiff for the term of five years upon the same terms and conditions upon which the stock was originally taken—to-wit, one-half the increase thereof."

This did not include any portion of the increase belonging to the defendant at the time the contract of 1875 was made, and was therefore correct.

But whatever uncertainty there was in the foregoing instruction was removed by the following instruction, which was also given by the Court:

"In the agreement of August 26, 1875, it was agreed that Thomas should keep and retain all of the original stock, *and the increase thereof, due from Thomas to Witherby,* for the term of five years from that date, or until the same were disposed of by Witherby, upon the same terms and conditions upon

which the stock was originally taken—to-wit, for one-half of the increase thereof."

This was certainly the import of the agreement of August 26, 1875, clearly and distinctly stated to the jury. We are therefore of the opinion that the jury could not have been misled, and the defendant could not have been prejudiced by any apparent conflict found in the third instruction.

Third. The next error assigned is in the refusal of the Court to give the second and third instructions asked by the defendant. In answer to this it is sufficient to say that the third instruction did not contain a correct statement of the law, and the second instruction was fully covered by the instructions given and referred to above.

Fourth. The fourth error alleged is that the Court erred in giving the fourth and fifth instructions asked by the plaintiff. The fourth instruction merely relates to the degree of care the defendant was required to exercise in keeping the stock, and was correct. The fifth instruction was to the effect that the defendant was required to account for all the original stock received by him from plaintiff and the increase thereof, and was, in our opinion, properly given.

Fifth. It is claimed by the appellant that the Court erred in giving the following instruction to the jury:

"2. That under said contract the defendant is not entitled to recover for keeping and taking care of said property prior to the time that said property was finally divided and turned over to plaintiff and said business venture was closed, unless the jury find from the evidence that after entering into said contract the said parties entered into another contract, fully terminating the one previously made, and releasing defendant from his original obligation."

It was not contemplated by the terms of the first or second contract that the defendant should receive any pecuniary consideration for keeping the cattle; and unless a new contract was made, imposing upon the plaintiff the obligation of paying the defendant such compensation, none existed. The instruction was therefore correct.

Sixth. The next error assigned is that the Court erred in refusing to permit the defendant to amend his answer. The transcript shows (fol. 115) that on the trial the defendant moved the Court for leave to amend his answer, to which plaintiff objected unless terms were imposed; and thereupon defendant stated that he would rather withdraw the motion than have it granted on terms, "*and thus the matter ended.*" There was no ruling of the Court on the subject, and no exception taken.

Seventh. The seventh and last point presented on this appeal is that the Court erred in overruling defendant's objection to the evidence of Manasse and Parker. The witness Manasse and one Cassidy were experienced stock raisers, and were called to testify to the usual increase of cattle in that part of the country, and they did testify what, as a general rule, through good and bad years, such increase would be. To this evidence no objection was interposed, and then the witness Manasse was asked the following question:

"According to the usual rate of increase and loss, how many, if any, cattle would there have been remaining after the sale last mentioned, and how many on the first of August, 1878?"

The defendant objected to the question on the ground that such evidence was hypothetical, speculative, and delusive; that it had no tendency to prove the number of cattle actually on hand at the dates mentioned, or to show any breach of contract or negligence on the part of defendant. The Court overruled the objection, and the defendant excepted. The witness answered that he had figured upon that data—the data already given by him—and stated the result.

It was simply an arithmetical calculation made by the witness, the correctness or incorrectness of which could have been tested by any one familiar with figures, and therefore could not, in our opinion, have worked any injury to the defendant. The same may be said of the evidence of the witness Parker.

We have now examined all the points made on the appeal, and, failing to find any substantial error in the proceedings in the Court below, the judgment and order are affirmed.

We concur: McKee, J., Ross, J.

DEPARTMENT No. 1.

[Filed May 14, 1880.]

[No. 10,499.]

PEOPLE vs. BONE.

From the Bench:

No points and authorities have been filed on behalf of defendant, nor has there been any appearance for him in this Court.

Judgment and order are affirmed.

DEPARTMENT NO. 2.

[Filed April 26, 1880.]

[No. 6606.]

LIVERMORE, APPELLANT, vs. HODGKINS, RESPONDENT.

POWER OF DISTRICT COURTS OVER EXECUTIONS—STAY OF PROCEEDINGS—EX PARTE ORDERS. A District Judge has no authority to make an *ex parte* order without notice, recalling and staying an execution. When a judgment is obtained it should be enforced, unless set aside or modified in due course of law.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Stetson & Houghton, for appellant.

P. T. Colby and *V. A. Gregg*, for respondent.

MYRICK, J., delivered the opinion of the Court:

September 12, 1877, plaintiff recovered judgment against defendants Hodgkins, Mills Jr., Howlett, and Griffiths for the possession of certain lands, and for $500 rents and profits, $200 damages, and for costs. A writ of possession and execution was issued, which was afterwards returned executed as to the possession, and nothing made as to the rents, profits, damages, and costs. December 4, 1878, an execution was issued for $720.80, the $20.80 being the costs. The execution was levied on real estate, which was advertised to be sold on the 30th of December, 1878. On December 20, 1878, on the affidavits of Howlett, Colby (one of the attorneys for defendants), and of the Clerk, the District Judge of Kern County made an *ex parte* order, without notice, that the Clerk recall the execution, and that the Sheriff refrain from selling the property advertised. On the 26th the Sheriff, under that order, returned the execution. January 9, 1879, plaintiff gave notice of motion to vacate the order of December 20, 1878, recalling the execution and staying the sale. January 24, 1879, the said District Judge, without notice, made a further order reciting that Howlett, one of the defendants, had commenced an action to vacate the judgment, and directing that the execution be stayed until said action be determined or until futher order. The next day the District Court made an order denying plaintiff's motion to vacate the order of December 20, 1878, and directing that the execution be stayed until said other action be determined or until further order. February 25, 1879, plaintiff gave notice of motion to vacate the order of January 24th, which came on for hearing before the court March 14, 1879, and was de-

nied. Plaintiff appealed from the orders of January 25, 1879, and March 14, 1879.

The District Judge had no authority to make the orders of December 20, 1878, and of January 24, 1879; and the Court erred in refusing to set aside and vacate those orders, and in making the order of January 25, 1879, staying the execution. Plaintiff having obtained his judgment is entitled to enforce it, unless it be set aside or modified in due course of law.

The orders of January 25, 1879, and March 14, 1879, are reversed, and this cause is remanded to the Superior Court of Kern County, with instructions to vacate the orders of December 20, 1878, and January 24, 1879.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 1.

[Filed April 27, 1880.]

[No. 6874.]

GOSS, RESPONDENT, vs. STRELITZ, APPELLANT.

MECHANICS' LIEN—INSUFFICIENCY OF CLAIM—STATUTE CONSTRUED. The statute respecting liens of mechanics and others upon real property provides for the enforcement of the *lien*, and attempts to create no privity by which the owner shall become personally liable to the sub-contractor or material man; and the rights of sub-contractors and material men must be ascertained by reference to the *liens as filed*. So where nothing but the value and date of furnishing the materials is set forth in the claim of lien, it is insufficient.

IDEM. The findings must show affirmatively that the materials furnished have not been paid for.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Thom & Ross, for respondent.

Brunson & Wells, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

Section 1187 of the Code of Civil Procedure—a section which forms part of the chapter which treats of "Liens of Mechanics and others upon real property"—reads:

"Every original contractor, within sixty days after the completion of his contract, and every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record with the County Recorder of the county in which such property, or some part thereof, is

situated, a claim containing a statement of his demand, after deducting all just credits and offsets, with the name of the owner or reputed owner, if known, and also the name of the person by whom he was employed or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and also a description of the property to be charged with the lien, sufficient for identification, which claim must be verified by oath of himself or of some other person."

Within thirty days after the completion of the building for which the material was furnished, plaintiff (a material man) filed his *claim of lien*, the portions whereof necessary to be considered are as follows:

"Such interest as Jacob Strelitz, the owner of said building, had therein on the 20th day of February, 1877, when said materials were commenced by me to be furnished for said building. That Jacob Weixel is the person by whom I was employed to furnish the said material, and at whose instance and request I did fnrnish the same, he (the said Weixel) being the contractor of said building. That the following is a true statement of my demand, for which I claim said lien—namely, materials to-wit: Bricks to the amount and of the value of $2,125 in United States gold coin, which said bricks were furnished by me to be used, and were in fact used, in the construction of the said building. That neither the said Jacob Weixel nor the said Jacob Strelitz, nor any one of them or either of them, have paid me any part of said sum of $2,125, except $1,429.25 thereof, and that the sum of $695.75 in United States gold coin is now justly due to me from said Jacob Weixel and Jacob Strelitz for said materials so furnished and used as aforesaid, after deducting all just credits and offsets. That the said bricks were commenced by me to be furnished for the construction of said building on the 20th of February, 1877, and were continued so as to be furnished up to and including the 14th day of April, 1877, and that thirty days have not elapsed since the completion of said building. That, according to the conditions of sale, the said materials were to be paid for in United States gold coin, and within thirty days after the delivery thereof."

Recorded liens bind a building only ninety days, unless in the meantime suits shall be brought to foreclose them. The statute provides for the enforcement of the *liens* of the sub-contractors and material men against the particular property of the owner of the building and surrounding lands, and attempts to create no privity by which the latter shall be-

come personally indebted to the former; it is the *liens* which are to be marshaled and their relative rank declared. The scheme as a whole, as well as its details, indicates the purpose of the law-makers that the rights of the sub-contractors and material men should be ascertained by reference to the *liens as filed*, or should rest upon proof of contracts between them and the original contractor such as accord with the terms and conditions set forth in the claims of lien.

The number or quantity of brick supplied by plaintiff is not mentioned in his *claim*, and there is nothing from which either defendant or other claimants could be informed of the actual demand for which the lien is claimed, except the alleged *value* and the dates between which the bricks are said to have been furnished. For aught that appears from the findings of the Court below, the brick for which plaintiff recovered may all, or all but the smallest portion of them, have been furnished antecedent to the date when the delivery of brick was commenced, according to the statement in plaintiff's *claim of lien*. It affirmatively appears that some of the brick was furnished prior to that date, the Court finding that "the statement in the lien (as to dates of delivery) was made by *mistake* of plaintiff, and is erroneous." This action was not brought to obtain a correction of plaintiff's lien. But if it were, a claim of lien is not an instrument in the nature of a written *contract*, to be *reformed* by a court of equity in appropriate cases. It is rather a prerequisite to the maintenance of a proceeding which gives a plaintiff an extraordinary remedy, to secure the benefit of which he must comply with the terms on which the statute extends to him the statutory relief.

The findings do not show but that plaintiff has been more than paid for the brick furnished between the dates mentioned in the claim of lien, and for this reason alone the judgment should be reversed.

Judgment and order reversed, and cause remanded.

I concur: Thornton, J.

CONCURRING OPINION.

I concur in the judgment, because, in addition to the reasons given by Mr. Justice McKinstry, I think the Court below erred in finding that the contractor was indebted to the plaintiff on the 22d of April, 1877, in the sum of $600, for a balance due for the bricks which the plaintiff had furnished for the construction of the building of the defendant.

The admissions of the plaintiff in the asserted lien, and those in the complaint, as to the value of the bricks, and the

proofs of the plaintiff as to the money which he had received from time to time on account of them, conclusively show that the contractor was not indebted to the plaintiff at the utmost more than $375. And assuming it to be true, as in the asserted lien it is stated and verified by the oath of the plaintiff, that the plaintiff commenced to furnish bricks for the building on the 20th of February, 1877, and continued to furnish them from time to time until the 14th of April, 1877, it is not proven that the contractor was indebted to the plaintiff in any sum whatever for which the defendant would be legally chargeable in this action. It is true that the Court finds that the plaintiff applied a portion of the money which he received from the contractor on account of the bricks to the satisfaction of a balance of an open general account which he had against the contractor; and in that way it finds the sum of $600 to have been due the plaintiff. But the plaintiff had no authority to make such an application of the money. He could not legally apply any portion of it to extinguish an obligation arising out of general dealings between himself and the contractor unconnected with the contract under which he was furnishing bricks for the defendant.

All payments made by the owner of a building to his contractor, and those made by a contractor to a material man for materials furnished to be used in a building, should be applied in satisfaction of the original contract. Neither the contractor nor a material man, nor workmen upon a building, can legally apply any portion of such payments to the satisfaction of general debts or demands existing between himself and others who may be entitled to file liens upon the building against the owner. If that could be done, it would have the effect of subjecting the owner to payment of other debts between the contractor and his employees outside of his building contract. MCKEE, J.

(Mr. Justice Ross being disqualified did not take part in this decision.)

IN BANK.

[Filed May 3, 1880.]

[No. 6377.]

CARR vs. CRONAN AND CARR vs. MCMURRY.

By the Court:

Upon the authority of the opinion heretofore filed in these causes, the orders are affirmed. Petition to hear causes in bank denied.

DEPARTMENT No. 2.

[Filed April 29, 1880.]

[No. 7049.]

MANUELA W. DE ROWLAND, APPELLANT,

vs.

COYNE ET AL., RESPONDENTS.

APPEARANCE. Filing a demurrer by an attorney is an appearance under section 1014, C. C. P.

AFFIDAVIT OF MERITS—WHAT IS SUFFICIENT. An affidavit in the following language is sufficient: "I am the principal defendant in this action, and have a personal knowledge of the matters to be put in issue therein; that I have fully and fairly stated the facts in this case to my counsel, L. C., E. P., and W. M. S., and after said statement they informed me that I had a good and valid defense upon the merits to said action and to all of it, all of which I verily believe to be true."

IDEM. Where a sheriff and his sureties are sued, an affidavit of merits made by the sheriff is sufficient without being joined by the sureties.

Appeal from the Superior Court, Los Angeles County.

J. S. Chapman, for appellant.

Levi Chase, E. Parker, and *William W. Smith*, for respondents.

THORNTON, J., delivered the opinion of the Court:

This action was brought in the Superior Court for the county of Los Angeles againt Joseph Coyne, the Sheriff of the county of San Diego, and the sureties on his official bond, to recover damages for an alleged breach by the Sheriff of the conditions in the instrument last named. Service of summons was made on all the defendants to the action in the county of San Diego, except Joseph Tasker, one of the sureties above referred to. The action was commenced on the 6th of January, 1880, and on the 28th of the same month a demurrer was served and filed by Chase, Parker, and Smith, who signed the demurrer as "attorneys for defendants." The demurrer begins as follows: "And now come the defendants in the above entitled action, and for demurrer to," etc.

At the same time this demurrer was filed and served, a demand in writing that a trial of the case should be had in the county of San Diego was served and filed by the above named attorneys on behalf of all the defendants, and an affidavit of merits was made by Joseph Coyne, and also an affidavit that all the defendants were, when the action was commenced, residents of the county of San Diego, and that no one of them resided in the county of Los Angeles; that Tas-

ker was not at that time in the county of San Diego, but was then, and still is, temporarily living in the Territory of Arizona.

The plaintiff did not comply with the demand, and on the same day on which the demand and affidavit of merits was filed and served, a notice was served on the attorney for plaintiff by the attorneys above mentioned, on behalf of all the defendants, that on the second of February, 1880, a motion would be made on papers above mentioned, and on the pleadings and papers on file in the action, to change the place of the trial of the cause from the county of Los Angeles to the county of San Diego. This motion came on regularly to be heard, at which time those affidavits were read on the motion, which it is unnecessary, in the view we take of the cause, to refer to further. The Court granted the motion, to which an exception was taken, and from the order granting this motion this appeal is prosecuted.

It is contented that Tasker had made no appearance in the action, and was not entitled to move for a change of the place of trial. We have seen that certain attorneys regularly demurred to the complaint for all the defendants. This is an appearance under the express provisions of the Code. (C. C. P., sec. 1014.) The case of *Chester* vs. *Miller*, 13 Cal. 561, cited by counsel for plaintiff, has no bearing on this question. The remarks of the Court in that case, in regard to the meaning of a recital of appearance by defendants, referred to a recital in the docket of a justice of the peace. We must hold the above an appearance of Tasker, or repeal the statute. The latter we cannot do.

It is argued that the affidavit of merit is insufficient. It is as follows:

"(Title of Court and Cause.)

"AFFIDAVIT OF JOSEPH COYNE.

"Joseph Coyne being first duly sworn, on oath says:

"I am the principal defendant in this action, and have a personal knowledge of the matters to be put in issue therein. That I have fully and fairly stated the facts in this case to my counsel, Levi Chase, E. Parker, and Will M. Smith, and after said statement they informed me that I had a good and valid defense upon the merits to said action and to all of it, all of which I verily believe to be true.

"JOSEPH COYNE.

"Subscribed and sworn to before me this 27th day of January, 1880.

"[Notarial Seal.] GILBERT RENNE,
"Notary Public."

The criticism is that the affiant Coyne swore to the fact only that his counsel *informed* him that he had a good and sufficient defense, etc. We do not so construe the affidavit. Coyne, in our opinion, deposed to the fact that he was informed by counsel as he states; and further, that he then believed all of it. The affidavit is sufficient.

There is nothing in the objection that the affidavit of merits was made by one of the defendants only. It was used on behalf of all. If Coyne, the Sheriff, had a defense on the merits, it followed that the defendants, his sureties, had the same.

We find no error in the record. The order was properly made and is affirmed.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 2.

[Filed April 8, 1880.]

[No. 6500.]

DOWNING, RESPONDENT, vs. GRAVES, APPELLANT.

CONTRACTS—SUB-CONTRACTOR. Where an owner lets a contract for the erection of a house according to specifications, which provide that the owner may make alterations and additions which shall not violate or vitiate the contract, and the contractor sublets a part of the work, and the owner directs alterations and additions in the work provided for in the sub-contract, the sub-contractor cannot maintain an action against the owner for the work performed by him. The owner has the right by his own contract to make such alterations as he desires, and the sub-contractor makes his contract in subordination to this right, and the exercise of this right raises no contract between him and the owner.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Robinson, Olney & Byrne, for respondent.

Bishop & Fifield, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The action is for work and labor performed and for materials furnished by plaintiff for defendant. The facts may be fairly summarized as follows:

1. The defendant contracted in writing with O'Mahoney & Brother to build for him a dwelling-house in accordance with certain plans and specifications, under the direction and supervision of Raun & Kenitzer, architects. The painting of the building was included in the contract and specifications. And the defendant reserved the right to have the work vary from the plans and specifications, upon the usual

condition that if the change increased the expense of the work, such increase should be added to the contract price; and if it reduced the expense of work, a corresponding reduction should be made from the contract price.

2. O'Mahoney & Brother sublet the painting of the building to the plaintiff, who agreed to do said painting in accordance with the specifications of the contract between defendant and O'Mahoney & Brother for the sum of $2,900.

3. The plaintiff performed his contract with O'Mahoney & Brother, but was required by the defendant to vary materially from the specifications contained in the contract between defendant and O'Mahoney & Brother; and the variations required by defendant very materially increased the expense of the work above what it would have been if the specifications had been strictly followed.

4. O'Mahoney & Brother paid plaintiff $2,900, the price stipulated to be paid by them to him for performance in strict compliance with the specifications for the painting of the building. When the building was nearly completed, one of the contractors (Mr. J. O'Mahoney) told Mr. Raun, the supervising architect, that he (O'Mahoney) did not wish to settle for the extra work, and preferred that the bills for such work should be presented directly to Mr. Raun for allowance, to which Mr. Raun assented.

5. The plaintiff presented his bills for extra work to Mr. Raun, and they were unable to agree upon the value thereof. Plaintiff had some conversations with defendant in relation to said bills, and defendant said that he would pay whatever sum Mr. Raun would certify to as the value of said extra work, and $400 in addition thereto, which plaintiff declined to accept.

6. The plaintiff did perform certain work for the defendant, which was not provided for in the contract between the defendant and the O'Mahoneys, or in that between them and the plaintiff.

7. The plaintiff does not claim that the O'Mahoneys ever assigned to him any part of the contract between them and the defendant, but sues upon an alleged contract between plaintiff and defendant for the value of all the work performed, less $2,900 paid by the O'Mahoneys.

We are unable to distinguish this transaction from the ordinary one of a person taking a contract to complete a house, and then subletting the carpentry to a carpenter, the masonry to a mason, the painting to a painter, and the plumbing to a plumber. We have never supposed that the person who originally contracted with another for the building of a

house thereby incurred any liability to pay the sub-contractors of the original contractor, except such as might be fastened upon him by proceedings under the mechanic's lien law. And this is not an attempt to enforce any such liability. It is claimed in this case that the defendant required the painting to be done so differently from the specifications as to constitute a complete departure from them. That may be true, and there is evidence tending to prove that the defendant did insist upon a very wide departure from the specifications. But he had expressly stipulated with O'Mahoney & Brother that he should have the right to require such deviations from the specifications, without in any way violating or vitiating the contract between him and them. The plaintiff knew of this stipulation when he made his contract with O'Mahoney & Brother, and contracted with reference to it. That O'Mahoney & Brother were bound to pay plaintiff for the extra work cannot be doubted. Nor can it be doubted that the defendant was bound to pay O'Mahoney & Brother for it. The circumstance of the defendant's giving directions himself, as well as through the foreman of the principal contractors and the architect, as to the deviations from the specifications, is of no consequence. His contract with O'Mahoney & Brother gave him that right without limitation. The exercise of it did not and could not effect any change in the relation between him and the plaintiff. It established no contract relation between the plaintiff and defendant. And there is no evidence which tends to prove that any such relation existed between them as to the work which the O'Mahoneys contracted to do. If the claim of the principal contractors against the defendant for extra painting passed to the plaintiff by assignment or novation, the plaintiff has not alleged nor the Court found such to be the fact.

The complaint was demurred to on the grounds of not stating facts sufficient to constitute a cause of action; of not separately stating several causes of action; and of being ambiguous, etc. The demurrer was overruled. We are satisfied that the complaint states only one cause of action, and that is for work and labor performed and materials furnished. It is not stated in the usual form, but is free, we think, of ambiguity.

There is something due to plaintiff for work, etc., which is not covered by the contract between the defendant and the O'Mahoneys, which of course might properly be recovered under the complaint as it now stands. It is unnecessary to state here what that amount appears to be, as we

have determined to remand the case to the Superior Court for a new trial.

Judgment and order denying a new trial reversed.

We concur: Morrison, C. J., Thornton, J.

DEPARTMENT No. 1.

[Filed May 14, 1880.]

[No. 10,516.]

PEOPLE vs. BOJORQUEZ.

DEPOSITION—UNWELL WITNESS. The deposition of a witness containing his testimony taken down at a preliminary examination is incompetent, and cannot be read at the trial when it appears that the witness is within reach of process of subpœna though he is too unwell to be present.

Appeal from the Superior Court, Kern County.

Attorney-General, for respondent.

Thos. Rhodes, for appellant.

From the Bench:

At the trial the District Attorney offered the deposition of Frank Drake. The Court inquired of the Under Sheriff present what was "the condition" of Drake? The officer replied: "He is unwell; not able to leave his room, I don't think," and added that he had been in that condition for almost two weeks. Thereupon the Court permitted the deposition to be read.

The deposition, as is stated in the bill of exceptions, was the *testimony* of the witness Drake, taken down by the justice of the peace on the preliminary examination of defendant under the charge in the indictment.

The defendant objected to the introduction of the "*testimony*" as being *incompetent*, irrelevant, and immaterial. The objection was overruled, and exception noted.

The Penal Code, section 686, permits such a deposition to be read at the trial only in certain cases, no one of which is that the witness, although within reach of process of subpœna, is too unwell to appear before the jury. The deposition was therefore *incompetent*; and as the deposition contained the *testimony*, the latter also was incompetent.

We think it would be hypercritical to hold that the language employed by defendant's counsel in making his objection did not sufficiently point to the proposition that the deposition was inadmissible, because the absence of the witness was not accounted for in such manner as would alone render the deposition competent.

Judgment and cause remanded for a new trial.

United States Circuit Court,

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

IN RE WONG YUNG QUY ON HABEAS CORPUS.

1. CONSTITUTION—DISINTERMENT OF CHINESE. The statute of California making it an offense to disinter or remove from the place of burial the remains of any deceased person without a permit, for which a fee of $10 must be paid, does not violate subdivision 3 of section 2, Article I, of the Constitution of the United States, providing that "Congress shall have power to regulate commerce with foreign nations."
2. SAME. Nor does it violate subdivision 2 of section 10, Article I, providing that "no State shall, without the consent of Congress, lay any impost or duties on * * * exports."
3. SAME. Nor is it in conflict with the Fourteenth Amendment, which prohibits any State from denying to "any person within its jurisdiction the equal protection of the laws."
4. SAME—TREATY WITH CHINA. Nor does it violate the fourth article of the treaty with China, called the Burlingame Treaty, which provides that "Chinese subjects in the United States shall enjoy entire liberty of conscience, and shall be exempt from all disability or persecution on account of their religious faith or worship." (16 Stat. 740.)
5. SAME. The Act is a sanitary measure within the police powers of the State, and as such is valid.
6. A CORPSE IS NOT PROPERTY, and the remains of human beings carried out of the State for burial in a foreign country are not exports within the meaning of the clause of the National Constitution prohibiting the laying of imposts or duties by the State upon exports.

BEFORE SAWYER, CIRCUIT JUDGE, AND HOFFMAN, DISTRICT JUDGE.

Geo. E. Bates and *J. M. Rothchild*, for petitioner.
Crittenden Thornton, for respondent.

SAWYER, Circuit Judge, HOFFMAN, J., concurring:

On April 1, 1878, the Legislature of California passed an Act entitled "An Act to protect public health from infection, caused by exhumation and removal of the remains of deceased persons," sections 1, 2, 3, 4, and 6 of which are as follows:

"SECTION 1. It shall be unlawful to disinter or exhume from a grave, vault, or other burial place, the body or remains of any deceased person, unless the person or persons so doing shall first obtain from the Board of Health, Health Officer, Mayor, or other head of the municipal government of the city, town, or city and county where the same are de-

posited, a permit for said purpose. Nor shall such body or remains disinterred, exhumed, or taken from any grave, vault, or other place of burial or deposit, be removed or transported in or through the streets or highways of any city, town, or city and county, unless the person or persons removing or transporting such body or remains shall first obtain from the Board of Health or Health Officer (if such board or officer there be), and from the Mayor or other head of the municipal government of the city or town, or city and county, a permit in writing so to remove or transport such body or remains in and through such streets and highways."

"SEC. 2. Permits to disinter or exhume the bodies or remains of deceased persons, as in the last section, may be granted, provided the person applying therefor shall produce a certificate from the Coroner, the physician who attended such deceased person, or other physician in good standing cognizant of the facts, which certificate shall state the cause of death or disease of which the person died, and also the age and sex of such deceased; and provided further, that the body or remains of deceased shall be inclosed in a metallic case or coffin, sealed in such manner as to prevent, as far as practicable, any noxious or offensive odor or effluvia escaping therefrom, and that such case or coffin contains the body or remains of but one person, except where infant children of the same parent or parents, or parent and children are contained in such case or coffin. And the permit shall contain the above conditions and the words, 'Permit to remove and transport the body of ——, age ——, sex ——;' and the name, age, and sex shall be written therein. The officer of the municipal government of the city or town, or city and county, granting such permit, shall require to be paid for each permit the sum of $10, to be kept as a separate fund by the Treasurer, and which shall be used in defraying expenses of and in respect to such permits, and for the inspection of the metallic cases, coffins, and inclosing boxes herein required; and an account of such moneys shall be embraced in the accounts and statements of the Treasurer having the custody thereof."

"SEC. 3. Any person or persons who shall disinter, exhume, or remove, or cause to be disinterred, exhumed, or removed from a grave, vault, or other receptacle or burial place, the body or remains of a deceased person, without a permit therefor, shall be guilty of a misdemeanor, and be punished by fine not less than fifty nor more than $500, or by imprisonment in the county jail for not less than thirty

days nor more than six months, or by both such fine and imprisonment. Nor shall it be lawful to receive such body, bones, or remains on any vehicle, car, barge, boat, ship, steamship, steamboat, or vessel, for transportation in or from this State, unless the permit to transport the same is first received and is retained in evidence by the owner, driver, agent, superintendent, or master of the vehicle, car, or vessel."

"SEC. 4. Any person or persons who shall move or transport, or cause to be moved or transported, on or through the streets or highways of any city or town or city and county of this State, the body or remains of a deceased person which shall have been disinterred or exhumed, without a permit as described in section 2 of this Act, shall be guilty of a misdemeanor, and be punishable as provided in section 3 of this Act."

"SEC. 6. Nothing in this Act contained shall be taken to apply to the removal of the remains of deceased persons from one place of interment to another cemetery or place of interment within the same county; provided, that no permit shall be issued for the disinterment or removal of any body, unless such body has been buried for two years." (Stat. 1877–8, 1050.)

The petitioner, Wong Yung Quy, is, and Wong Wai Toon was, in his lifetime, a subject of the Emperor of China, of the Mongolian race, residing in the United States. Wong Wai Toon died in January, 1876, and was buried in Laurel Hill Cemetery, a public cemetery of the city and county of San Francisco. In October, 1879, petitioner, a relative of the deceased, having complied with all the provisions of said Act, except the payment of $10 required by said Act to be paid for an exhumation and removal permit, demanded from the proper authorities permission to remove the remains of said Wong Wai Toon from said cemetery, and ship them to China. Refusal having been made on the ground of the non-payment of said fee of $10 required to be paid by said Act, the petitioner proceeded to disinter and remove said remains without a permit, and was arrested in the act, tried and convicted for the offense created by said statute in the Court having jurisdiction, and sentenced to pay a fine of $50, or, in default of such payment, to imprisonment in the city and county jail for a period of twenty-five days. Failing to pay the fine, and being imprisoned in pursuance of the judgment, he obtained a writ of *habeas corpus;* and he now asks to be discharged on the ground that the provision of said Act, requiring the payment of said fee for a permit,

violates the treaty with China, known as the Burlingame Treaty, and the Constitution of the United States, and is therefore void. All the other provisions of the Act having been complied with, the only question is as to the power of the Legislature to require the petitioner to take out a permit at a cost of $10 as a condition of disinterment and removal of the remains of his relative from their place of burial.

The first point made is that the Act, in the requirement in question, violates subidvision 3 of section 8, Article I, of the National Constitution, which provides that "Congress shall have power to regulate commerce with foreign nations." We are unable to perceive any violation of this provision of the Constitution, under the broadest construction claimed by petitioner for the term "commerce," even if it includes the transportation of the remains of aliens to their own country for final sepulture. There is no reference to aliens or to any extra-territorial Act of any kind anywhere in the statute, except in the last clause of section 3, which is a wholly independent and different provision from that under consideration, creating an additional offense, and might be wholly omitted without affecting the remainder of the Act. It is not necessary now to consider the question of the validity of that provision. The Act deals with matters wholly within the State—within its territority—with the remains of parties who have lived and died within its jurisdiction, and which have been buried and which still remain buried in its soil; and professedly and apparently for sanitary purposes. The statute knows nothing of the objects or motives of the exhumation, except as provided in section 6 that the Act shall not apply to removals from one place of interment to another in the same county. This exception is doubtless made for those common cases wherein no vault or burial place has been provided for the deceased during life, and the remains are temporarily deposited in a public receiving vault, or the vault or grounds of some friend, till the surviving friends can provide for a place of final sepulture. These removals are ordinarily from one place of burial to another in the same or an adjacent cemetery, where there are several cemeteries lying near each other, as in San Francisco, and therefore not so fully within the reason upon which the Act is founded. The statute deals with the local inter-territorial fact of burial and exhumation, without regard, in other respects than that stated, to motive or intention, race or nation, citizenship or alienage, future domestic or foreign sepulture. The matter of the burial and ex-

humation of the dead, with a view to sanitary objects, has in all times and among all civilized nations been regarded as a proper subject of local regulation. It is founded upon the law of self-protection. The fact that in many or even most instances the object of disinterment is to send the remains abroad, cannot affect the question. The local sanitary considerations must be the same, whatever the purpose of exhumation and transportstion through the streets of a city. The fact that the Chinese exhume and transport to their own country the remains of all or nearly all their dead (amounting to more than ninety per cent. of all such removals), while other aliens and citizens comparatively but rarely perform these acts, only shows that this generality of practice requires more rigid regulations and more careful scrutiny, in order to guard against infectious and other sanitary inconveniences, than would otherwise be required. In Secor's case, Pratt, J., says: "A proper respect for the memory of the dead, a regard for the tender sensibilities of the living, *and the due preservation of the public health*, require that the corpses *should not be disinterred or transported from place to place*, except under extreme circumstances of exigency." (18 Alb. Law Jour. 488; 31 Legal Int. 268.) The exposure of unburied human remains, or neglect to inter the same by the person on whom the duty is cast, is a misdemeanor at common law. (See *Rex* vs. *Stewart*, 12 Ad. & E. 773; *Chapple* vs. *Cooper*, 13 Mes. & Wels. 252; *Ambrose* vs. *Kerrison*, 10 Com. B. 776; *Jenkins* vs. *Tucker*, 1 H. Black. 394; Willes, 536.) And this is doubtless so in part, at least, upon sanitary considerations generally recognized among enlightened nations.

We see nothing in the language of the Act, in the surrounding circumstances, or in the nature of the subject matter upon which the statute operates, to justify us in holding that the object of the Legislature was to impose burdens on the commerce or intercourse between this country and China, rather than to provide wholesome sanitary regulations for the protection of our people. The statute is general, and operates wholly upon matters within the territorial jurisdiction of the State, and without discrimination as to remains to be removed to any considerable distance, whether within or without the State, and is within the principle of the case *In re Rudolph*, recently decided in the United States Circuit Court for Nevada, upon drummers' licenses. (10 Cent. Law Jour. 224; 2 Fed. Rep. 65.) The exhumation and removal of the dead is not a matter of public indifference, harmless in itself, like the style of wearing the hair, as in the Queue

case; but it affects the public health, and its regulation is like the regulation of slaughter-houses and other noxious pursuits, strictly within the police powers of the State. (See *Ex parte Shrader*, 33 Cal. 286; *Slaughter-House Cases*, 16 Wall. 36.)

In *Gibbons* vs. *Ogden*, 9 Wheat. 203, Mr. Chief Justice Marshall says:

"But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the States. * * * The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to a General Government, all of which can be most advantageously exercised by the States themselves. *Inspection laws, quarantine laws, health laws of every description*, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

If then, as claimed, the transportation of the remains of deceased persons to China is a part of foreign commerce, these supervising and inspection laws "act upon the subject before it becomes an article of foreign commerce," and while the remains are being "prepared for that purpose." They simply provide that the preparation of the remains for foreign transportation, while still within the State and under its jurisdiction, shall be made in *such a manner* as not to be detrimental to the public health.

The principles relating to sanitary laws recognized in *City of New York* vs. *Miln*, 11 Pet. 102; *Thorpe* vs. *R. and B. R. Co.*, 27 Vt. 140; *The Passenger Cases*, 7 How. 283; *Railroad Co.* vs. *Huson*, 95 U. S. 471, and numerous other cases, are broad enough to cover the provisions in question. In these respects this case differs materially from the Queue case, reported in 5 Sawyer, 553, and is more like the case arising under the Cubic Air Statute, which we held to be constitutional. It being within the constitutional power to regulate the disinterment and removal of the dead, and to provide officers to scrutinize and supervise the operation in order to secure a conformity to the laws, we see no reason why a fee cannot be charged to and collected from those who desire to exercise the

privilege, to defray the expenses of the inspection and supervision. The fee is charged under the law, not for the transportation or for the privilege of carrying the remains out of the country, but to pay the expenses of supervising their disinterment and due preparation for passing through the territory of the State, and through the streets of populous cities either to other parts of the State or elsewhere, without endangering the health of the people.

For similar reasons the provision in question does not violate subdivision 2 of section 10, Article I, of the Constitution, which provides that "no State shall, without the consent of Congress, levy any imposts or duties on imports or exports, *except what is absolutely necessary for its inspection laws.*" The case also seems to be within the terms of this exception. Besides, the remains of deceased persons are not "exports" within the meaning of the term as used in the Constitution. The term refers only to those things which are property. There is no property in any just sense in the dead body of a human being. (18 Alb. L. Jour. 487; 17 *Ib.* 258; *Pierce* vs. *Pro. of Swan Point Cemetery*, 14 Am. Rep. 667; 10 R. I. 227, and cases cited.) There is no impost or duty on exports in any proper sense, or in the sense of the Constitution. This provision of the Constitution was intended to prevent discrimination in matters of trade.

There is no violation of the Fourteenth Amendment to the National Constitution. There is no discrimination against or in favor of any class of residents. It operates upon aliens of all nationalities and upon all citizens alike. It applies to all cases of remains to be removed beyond the boundaries of the county, whether to foreign countries, to other States, or to other parts of this State. And there are no restrictions upon disinterments and removals of Chinese dead to other places within the same county for burial not applicable to citizens and all other aliens. It may be that the large number of Chinese removals suggested the necessity for stringent supervision; but we see no reason to suppose that the Act was not intended to operate upon all within its terms; and the testimony shows that it is, in fact, enforced against all alike. But whether enforced or not, the subject matter, as we have seen, is a proper one for regulation; and if the Act is not enforced upon all alike, there is a gross neglect of duty on the part of those appointed for this purpose under the law. If the provisions of the Act affect a larger number of Chinese than of any other class, it is not on account of any discriminations made by the law, but only because under their customs there is a much larger number of disinterments and

removals by them than by any others. (*In re Rudolph, supra,* and cases cited.)

There is nothing in the provision in question in conflict with Article IV of the Burlingame Treaty, which provides that "Chinese subjects of the United States shall enjoy entire liberty of conscience, and shall be free from all disabilities or persecutions on account of their religious faith or worship." Conceding that the religious sentiment of the Chinese requires that they shall remove the remains of their deceased friends to China for final burial, there is nothing in the provision forbidding or unduly obstructing the performance of that rite or religious duty, and nothing that does not equally apply to other aliens and citizens. It is only provided that, in the performance of that duty, proper precautions shall be taken not to endanger the health of the people among whom they have elected to live, and have died and once been buried. The fee established is only to liquidate the portion of the expense of supervision and inspection imposed upon the public resulting from their custom; and, like the other expenses of disinterment and removal, which the surviving friends voluntarily incur, is necessarily incident to their peculiar practice. The custom of the Chinese in this respect renders the supervision necessary and proper; and we can perceive no impropriety in charging them with the expense incident to it. The amount of $10 may seem large, but it is charged alike to all, and is not so large as to justify us in holding that it was manifestly intended to obstruct the performance of the duty; and we do not understand that the amount is regarded as objectionable if the charge is otherwise legal. Besides, it may well be questioned whether the treaty-making power would extend to the protection of practices under the guise of religious sentiment, deleterious to the public health or morals, or to a subject matter within the acknowledged police power of the State. (See *Reynolds* vs. *United States*, 98 U. S. R. 145, with respect to religious belief as affected by the First Amendment to the National Constitution.) But, under the view we take, it is unnecessary to consider the question now.

We are satisfied that the provisions of the Act in question do not violate any provision of the National Constitution or of the treaty with China, and that there is no ground for discharging the prisoner by this Court.

Let the writ be discharged, and the prisoner remanded to the custody of the officer from whom he was taken.

May 24, 1880.

Abstract of Recent Decisions.

OREGON SUPREME COURT.

TENANCY FROM YEAR TO YEAR. Where A. leases of W. a store under a verbal lease for three years, and enters into possession and pays rent, such tenancy becomes a tenancy from year to year, and can only be determined by notice from one party to the other.—*Williams* vs. *Ackerman*, March 1, 1880.

RE-SALE BY SHERIFF. When a sheriff's sale of real property is set aside by the judgment of the Supreme Court, and a re-sale of the premises is ordered, such re-sale must be made in conformity with section 293, subdivisions 3 and 4, on page 169 of the Code; but if upon such re-sale the property shall be sold to any person other than the former purchaser, the clerk must first repay the former purchaser the amount of his bid out of the proceeds of the re-sale.—*Trullinger* vs. *Rocfoed*, March 2, 1880.

OREGON.

UNITED STATES DISTRICT COURT.

PAYMENT BY NOTE. The note of a third person given and received in payment of the debt of another is a valid contract, and operates to extinguish and discharge the original debt; and a note given by a partner in payment of a debt of the firm, as to such debt, is the note of a third person.—*In re Parker and Morris in Bankruptcy.*

IDEM—BURDEN OF PROOF. To constitute an absolute payment of a pre-existing debt by a promissory note, there must be an agreement to receive it as such; and the burden of proof is upon the party alleging the fact.—*Id.*

PREFERENCE. The creditor of an insolvent firm with knowledge of such insolvency, procured P., a member of the firm, to make his promissory note, secured by a mortgage upon his individual property, in payment of the firm debt: *Held* (1) That such payment was an unlawful preference over the other creditors of the firm, and therefore invalid. (2) That the mortgage was an unlawful preference over the creditors of P., and also the creditors of the firm, and therefore invalid. (3) That the creditor could only prove his debt againt the estate of the firm, and then only for a moiety thereof.—*Id.*

FRAUD BY A CREDITOR. The actual fraud on the part of a creditor receiving a preference contrary to section 39 of the Bankrupt Act as amended by section 12 of the Act of June 22, 1874 (18 Stat. 180), which will prevent him from proving his debt for more than a moiety thereof, is something more than the passive receipt of payment from an insolvent debtor with reason to believe him insolvent; but the creditor must be an actor in the fraud—must do something to induce or coerce his debtor to make him a payment under circumstances constituting it an unlawful preference.—*Id.*

Legal Facetiæ.

ODE TO SPRING.

WRITTEN IN A LAWYER'S OFFICE.

WHEREAS, on sundry boughs and sprays,
Now divers birds are heard to sing,
And sundry flowers their heads upraise—
Hail to the coming on of spring.

The songs of the said birds arouse
The memory of our youthful hours,
As young and green as the said boughs,
As fresh and fair as the said flowers.

The birds aforesaid—happy pairs!—
Love 'midst the aforesaid boughs enshrines,
In household nest, themselves, their heirs,
Administrators, and assigns.

O busiest term of CUPID'S Court!
When tender plaintiffs action bring;
Season of frolic and of sport,
Hail, as aforesaid, coming spring!

AN information for seduction had been filed before Justice ————, a justice of the peace for this city and county, and on the day set for the examination, defendant, prosecutrix, and witnesses appeared, and "His Honor" proceeded to hear the testimony. The examination lasted several days; and whether the defendant, seeing conviction inevitable, arranged the matter satisfactorily, or the prosecutrix failed to make a case, does not appear; but the last entry in the case on Justice ————'s docket is as follows: "Now on this —— day of ——— we again proceed to trial, and the case is dismissed because the prosecuting witness says SHE WAS MISTAKEN IN THE MAN."

THIS IS TRUE.—A *harum scarum* young lawyer, now of San Diego, California, then of Wilkes Barre, Pennsylvania, was defending a semi-lunatic indicted for larceny. The defendant's imbecility was almost ocularly apparent, and a good part of the jury bore to him a striking family resemblance. The decks of the forensic Pinafore being cleared for "summing up," our young Cicero brought the house down at his first discharge: "Gentlemen of the jury, my client, as you must plainly see, is an idiot; but, thanks to the wisdom of the common law and the ægis of our Constitution, he this day enjoys the glorious privilege of being tried by a jury of his peers!" Of course such a jury found the prisoner guilty.—*Western Jurist.*

Pacific Coast Law Journal.

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Current Topics.

WE call attention to the opinion of the Supreme Court of the United States in the case of *Meeks* vs. *Olpherts*, appearing in this issue, construing sections of our Code respecting the limitation of actions for real estate sold by order of the Probate Court, and the application of such statutes to administrators.

THE Superior Court of this city and county (five judges sitting) recently held, in the case of *Coolidge* vs. *Kalloch*—a proceeding for the removal of the defendant from the office of Mayor, under an Act of the Legislature passed March 30, 1874—that an officer cannot be removed under said Act for other than nonfeasance or malfeasance in office—that is, in the performance of duties pertaining to the office; that acts done as a citizen, though criminal in themselves, cannot be made the basis of a proceeding for the officer's removal under the Act.

IN a brief note a few weeks ago, we said that an appointment had been made by the Governor to fill a vacancy caused by the death of Judge BRIGGS, of the Superior Court of Mono County. We are pleased to correct this error. The Judge, as we are now informed, is in excellent health, and is doing satisfactory service to the people of that section. The appointment of Judge WIGGINS was made in pursuance of an Act of the last Legislature providing an additional Judge for that county.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed April 28, 1880.]

[No. 5818.]

FONTAINE, RESPONDENT,

vs.

SOUTHERN PACIFIC RAILROAD CO., APPELLANT.

LIABILITY OF RAILROAD COMPANIES FOR KILLING OR MAIMING STOCK—ABUTTING FENCES. Section 30 (Statutes continued in force, p. 169, sub. 2) simply provides that a railroad company shall not be compelled to perform its offer or agreement to fence on the sides of its road, where the same runs through uninclosed lands, until the owner thereof has built fences abutting upon said railroad. It does not exempt the company from liability for cattle killed on unfenced portions of its road.

IDEM—LEASE OF ROAD DOES NOT AFFECT LIABILITY. The liability of the lessor of a railroad, under the statute, for cattle killed by the cars and locomotives of the lessee running upon unfenced portions of the railroad, is not affected by the lease.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

R. E. Arick, for respondent.

J. W. Freeman and *C. H. Marks*, for appellant.

SHARPSTEIN J., delivered the opinion of the Court:

The plaintiff brought this action to recover the value of some cattle which he alleges were run over by locomotives and cars on the track of the defendant's railroad, by reason of the failure of the defendant to make and maintain a good and sufficient fence on either side or both sides of its said railroad track and property, as required by law.

The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled; and it is urged on behalf of appellant that the Court erred in overruling it, because "it was not the duty of the defendant to build fences along the line of its road until the plaintiff or his lessor, Beale, had constructed fences abutting on its road. (Statutes continued in force, p. 169, sec. 30, sub. 2.) The complaint fails to allege that such abutting fences had been constructed, and is therefore insufficient. Where the non-performance of a duty imposed by statute is relied upon as the gravamen of this action, the *conditions*, in view of which the duty is to be performed, must be averred."

The rule which is here invoked by the learned counsel is a familiar one; and if the statute which creates the liability

of railroad companies in cases like this makes the building of abutting fences by the owners of lands through which such roads run a condition precedent to a right to recover the value of cattle killed by locomotives and cars, the necessity of averring that such abutting fences existed at the time of the killing of such cattle would be apparent. No less so than the necessity of averring that the company had not made and maintained a sufficient fence on either or both sides of its property. But the statute, which creates the liability in cases like this, does not in terms make that liability depend upon the existence of abutting fences. It reads as follows:

"It shall be the duty of the railroad company to make and maintain a good and sufficient fence on either or both sides of their property; and in case any company do not make and maintain such fence, if their engine or cars shall kill, maim, or destroy any cattle or other domestic animals, when they stray upon their line of road where it passes through or alongside of the property of the owners thereof, they shall pay to the owner or owners of such cattle or other domestic animals a fair market price for the same, *unless the owner or owners of the animals so killed, maimed, or destroyed shall be negligent or at fault.*" (Statutes continued in force, p. 174, sec. 40.)

It is alleged in the complaint that the cattle and horses which were killed strayed in and upon the track and ground occupied by defendant's railroad without the fault of the plaintiff.

It is urged on behalf of the appellant that this is not sufficient, and that it was necessary for the plaintiff to specifically allege that abutting fences had been built on the land, from which the cattle killed by the defendant's cars strayed upon the railroad track. In support of this position, section 30 of the Act before referred to is cited. That section relates to the mode of assessing damages for lands taken for railroad purposes; and among other things it provides that "in assessing such damages they (the commissioners) shall include the cost of good and sufficient fences along the line of said railroad, and the cost of cattle-guards, where fences may cross the line of said railroad, unless said railroad company shall have offered or agreed in their petition to construct the same, in which case the cost of the same shall not be included in said damages; *provided*, if said land be unenclosed, said company shall not be required to construct said fences and cattle-guards until the owners of the land shall have constructed fences abutting on said railroad."

This clause is not necessarily inconsistent with the one which creates a liability for animals killed by a locomotive or cars running upon unfenced portions of a railroad. The clause quoted from section 30 simply provides that a railroad company shall not be compelled to perform its offer of agreement to fence on the sides of its road, where the same runs through uninclosed lands, until the owner thereof has built fences abutting upon said railroad. It does not exempt, or attempt to exempt, the company from the liability created by section 40 in any case. By this construction, effect is given to both clauses. If this were an action upon the defendant's offer or agreement to build a fence, its liability would have to be determined by a reference to section 30. But in an action to recover damages for the killing of cattle on its road, the question of its liability must be determined by reference to section 40.

The defendant answered, and among other things denied that "at any time mentioned in the complaint it failed to make or maintain a good or sufficient fence on either or both sides of the railroad track and property described in said complaint, *as required by law*;" and the Court found "that during the time aforesaid the said defendant failed to make and maintain a good and sufficient fence on either or both sides of its said railroad track and property, *as required by law;* and through the negligence of the defendant in that respect, the locomotives and cars of said defendant ran against and over the said cattle and horses of the plaintiff, and killed and destroyed the same."

This is objected to on the ground that it is not the finding of a fact, but a conclusion of law. It was said in *Figg* vs. *Mayo*, 39 Cal. 265, that "when the facts are so obscurely found, or are so blended with legal conclusions as to render it doubtful whether the facts are only hypothetically stated, we must disregard it as a finding of fact." If the Court had omitted the words "as required by law" in the above finding, it would not be obnoxious to criticism even. But as the finding, with or without these words, means precisely the same thing, we think that it may properly be treated as a sufficient finding of fact.

It is alleged in the answer that before the plaintiff's cattle were killed the defendant "leased unto the Central Pacific Railroad Company all of its (defendant's) railroad line then constructed and thereafter to be constructed from the town of Goshen, in the county of Tulare of said State, southerly through the counties of Tulare and Kern of said State, together with all the cars, locomotives, and appurtenances

thereunto belonging, or in any wise appertaining; and * * * said Central Pacific Railroad Company took possession and control, and has ever since had possession and control, of all of said railroad line, property, and appurtenances so leased and let to it, the said Central Pacific Railroad Company, by the said Southern Pacific Railroad Co., defendant herein. And * * * that ever since the railroad track, cars, locomotives, and appurtenances hereinbefore mentioned and described, have been in the exclusive control, management, and possession of said Central Pacific Railroad Company, and operated and run by it solely; and defendant * * * has never at any time since * * * had any control, management, or possession of the line of railroad mentioned in the complaint, or of the locomotives, cars, or appurtenances thereunto belonging, or has run or operated the same, or any part or portion thereof; and that if any damage has been caused by any matters alleged in the complaint, it has been caused and done by the said Central Pacific Railroad Company, and not by this defendant."

The only finding which seems to refer to this allegation is: "That the lease from the Southern Pacific Railroad Company to the Central Pacific Railroad Company, dated September 1, 1876, and the resolution introduced in evidence by the defendant, have never been recorded in the county of Kern, and there is no evidence that the plaintiff had any knowledge of the existence thereof."

If that allegation raises a material issue, this finding is not sufficient. In this action it is wholly immaterial whether the lease referred to has ever been recorded or not. The only question is, whether the lessor is liable for cattle killed by the trains of the lessee on unfenced portions of the lessor's railroad. If it is, the allegation in respect of the lease is immaterial, and no finding upon it was necessary. The liability is created by statute, and it only arises in the absence of sufficient fences. The actionable negligence consists in the omission to build fences. The statute provides that if any company does not make and maintain a good and sufficient fence on either or both sides of its property, and its engine or cars kill any cattle which stray upon the line of its road, where it passes through or alongside of the property of the owner of said cattle, such company shall pay the owner of the cattle so killed a fair market price for them, unless such owner shall be negligent or at fault. In many if not all of the States of the Union, similar statutes have been enacted, and there are several reported cases in which the question involved in this case was considered.

In Shearman & Redfield on Negligence, sec. 466, it is said: "When a railroad company runs its trains over a track belonging to another company, and such track is not properly fenced, a nice question arises as to which company, if either, is liable under the statute for injuries committed by the trains of the former company. We think the negligence of the company owning the track is to be imputed to the company running the trains, and that the latter is absolutely liable under the statute for injuries to animals."

This would seem to imply that, in the opinion of the authors, the lessor would not be liable under the statute for such injuries. But we are unable to discover any stronger reason for holding the lessee than for holding the lessor liable in such a case. A strictly literal interpretation of the statute might exempt both the lessor and the lessee from liability, as the statute does not in terms provide for a case in which one company owns and another operates a railroad. The duty, however, of fencing devolves upon the company owning the road; and if it leases the road in an unfenced condition to be operated by another company, it does seem to us that it is liable within the spirit, if not within the letter, of the law to the same extent, in cases like this, as it would be if its, instead of its lessee's, engine and cars had run over the plaintiff's cattle. As was said by the Court in *Tracy* vs. *The Troy and Boston Railroad Company*, 38 N. Y. 437: "The passage of this Act being induced by public considerations, and its purpose being to protect the traveling public and the owners of domestic animals along the line of their road, it should receive a liberal construction to effectuate the benign purpose of its framers. A rigid and literal reading would in many cases defeat the very object of the statute, and would exemplify the maxim that 'the letter killeth, while the spirit keepeth alive.' Every statute ought to be expounded, not according to the letter, but according to the meaning. *Qui hæret in literâ, hæret in cortice.* (Dwar. on Stat. 695.) And the intention is to govern, although such construction may not in all respects agree with the letter of the statute. (Plowd. 205.) The reason and object of a statute are a clue to its meaning (Dwar. on Stat. 695), and the spirit of the law and the intention of its makers are diligently to be sought after, and the letter must bend to these. (6 Bac. Abr. 384, 6th ed., London, 1807; Kent's Com. 465; Smith's Com. on Stat., secs. 709, 710.) The defendant in this case seeks to escape liability for the injury it has inflicted through the letter of the law."

The language of this statute is as follows: "It shall be the

duty of *the* railroad company to make and maintain a good and sufficient fence on either or both sides of *their* property; and in case any company do not make and maintain such fence, if *their* engine or cars shall kill, maim, or destroy any cattle," etc. This language imposes the duty to fence upon the company *which constructs and owns the road.* No such duty is imposed upon the lessee of the road. Therefore the learned counsel for the appellant insists that—"This language makes the *owner* of the road liable *only* when *its* engine, etc., kills or maims, etc., and not when the killing or maiming is done by the cars of a lessee. In neither respect does this language embrace the case of a lessee. In a case like the present, then, where one corporation owns the road, and another the engine and cars, and is operating the road under a lease, this statute can have no application; and hence the case is to be tried and determined according to the principles of the common law only."

Such a construction would render the statute a dead letter in any case in which a railroad had been leased, and no case has been brought to our attention in which it was held that neither the lessor nor the lessee would be liable in such a case. Nor have we found a case in which it was distinctly held that the company owning the road could exempt itself from such liability by leasing its road to another company. In the *Illinois Central Railroad Company* vs. *Kanouse*, 39 Ill. 227, which was an action against the lessee of the road, the Court says: "In the case before us, admitting it was the duty of the first party to the agreement (the company owning the road) to fence this road, that they would be liable for this injury had they been sued there can be no question." And in *Toledo etc. Railroad Company* vs. *Rumbold*, 40 Ill. 143, the same Court said, in an action against the lessors of the same road: "It was the duty of appellants to have fenced the road, and public safety demands that they should be held liable for all damages resulting from the neglect to fence it. And the same policy would require that the Illinois Central (the lessee) should be held responsible for presuming to use the road of another company fenceless and unprotected. *Either company would be liable for the injury.*" Redfield, in a note to the case of *Parker* vs. *Renselear and Saratoga Railroad*, 16 Barb. 315, in which it was held that the defendant, being the lessee of the road upon which the injury was committed, was not liable under the statute, says the only question in regard to the soundness of the decision is, whether both companies were not chargeable with negligence—*the one for suffering the road to be used, and the other for*

using it in that condition. (1 Redfield on the Law of Railways, 5th ed., 618.

It follows, from the view which we have taken of this question, that the defendant's liability under the statute could not be affected by the lease which it set up in its answer; and therefore it was unnecessary for the Court to find upon the issue raised by the allegation that the road had been leased, and was operated by the lessee at the time when the injury to the plaintiff's cattle was committed.

This case was argued before the late Supreme Court and submitted. That Court, as we are advised, requested further argument upon the question last discussed in this opinion. On the other points we understand that our views are in accord with those of the late Court.

Judgment and order denying the motion for a new trial affirmed.

We concur: Thornton, J., Myrick, J.

DEPARTMENT No. 2.

[Filed May 7, 1880.]

[No. 6183.]

THOMPSON, APPELLANT, vs. FELTON, RESPONDENT.

ADVERSE POSSESSION. To constitute adverse possession, the occupation must be open, visible, notorious, and exclusive, and must be retained under a claim of right to hold the land against him who was seized; and the person against whom it is held must have knowledge, or the means of knowledge, of such occupation and claim of right.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

Thos. P. Ryan, Flourney & Clarkson, Wm. Thompson, and *Leonard Reynolds,* for appellant.

John A. Stanley and *Delos Lake,* for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The plaintiff sues in ejectment for the recovery of about forty acres of land lying within a larger tract known as the Bernal Rancho. The entire tract was granted to the Bernals by the Mexican Government, and on the 31st day of December, 1857, the United States issued a patent to them for it. The defendant deraigns title through mesne conveyances from the Bernals. The plaintiff claims to have acquired title to the tract involved in this action by an adverse possession

thereof for a period of five years prior to the ouster. A verdict was rendered in favor of the plaintiff. The defendant moved for a new trial, which was granted; and from that order the plaintiff has appealed.

To establish an adverse possession for the statutory period, the plaintiff testified that in 1853–4 he inclosed a tract of about 118 acres, which included the land sued for in this action, and from that time until the latter part of 1855 he pastured stock within the inclosure. In November, 1855, he leased the premises to one Osborn, and went into the interior of the State, where he remained until 1863. In the meantime a patent for the rancho issued, and Osborn took a lease of the land in 1859 from J. Mora Moss, who at that time held the legal title to it under the patent. When the plaintiff returned to San Francisco in 1863, Osborn claimed to be in possession of about one-third of the tract leased to him by plaintiff. Osborn delivered and plaintiff assumed possession of all that Osborn had retained possession of up to that date.

Osborn never lived upon any part of the land leased to him by plaintiff, but testifies that he used it for pasturage, and kept the fences in sufficient repair for that purpose. The case has been here before under the title of *Thompson* vs. *Pioche* (44 Cal. 505), and the questions then decided must be treated as finally settled, so far as this case is concerned. One of the points decided was that if Moss had no knowledge, and after reasonable inquiry had failed to obtain any, of the relation which existed between the plaintiff and Osborn at the time when the latter took a lease from Moss, that the effect of the acceptance of said lease by Osborn from Moss was to interrupt the running of the Statute of Limitations, so that thereafter the possession of the plaintiff, through his tenant Osborn, was not adverse in a legal sense to the title of Moss and those claiming under him. And the Court further said: "We are of the opinion that the evidence failed to bring home to Moss notice of the plaintiff's claim to the land." The order granting a new trial reads as follows:

"This cause has been tried here three times, and each time there has been a verdict for the plaintiff. A new trial is now granted for the sole and only reason that the Court is of the opinion that the attornment of James Osborn, the tenant of the plaintiff, to J. Mora Moss, interrupted the running of the Statute of Limitations, and prevented the ripening of the title of the plaintiff. It is therefore ordered that the defendants have a new trial."

If the Court below was of the opinion that the evidence on the

last trial failed to bring home to Moss notice of the plaintiff's claim to the land, before or at the time of the execution of the lease from Moss to Osborn, then upon the authority of *Thompson* vs. *Pioche*, *supra*, it was the undoubted duty of the Court to grant a new trial on that ground.

It is urged, however, on behalf of the appellant that the evidence introduced on the last trial shows that Moss did have notice, or, what is equivalent to notice, information sufficient to put him upon inquiry as to the fact, that Osborn was in possession of the premises as the tenant of the plaintiff, and not otherwise. The testimony of Moss is not as clear on that point as we might desire it to be; but we are satisfied that when testifying in regard to the tenancy of Osborn he had reference to another tract than that claimed by the plaintiff of which Osborn had a lease. And this is entirely consistent with the testimony of Osborn, in which he said that he did not think he told Moss of his (Osborn's) lease from plaintiff. The Judge before whom the case was tried doubtless took this view of it; and as that accords with our own, we should not disturb the order granting a new trial if there were no other grounds upon which the order could be sustained.

There is, however, at least one other ground upon which we think that the order should be affirmed. The following extract from the instructions of the Court to the jury was as a whole, we think, objectionable, and it was excepted to by the respondent. The Court read to the jury section 325 of the Code of Civil Procedure, and then proceeded as follows:

"Now upon this statute our Supreme Court, in this particular case of *Thompson* vs. *Pioche*, says: 'To constitute adverse possession, the occupation must be open, visible, notorious, and exclusive, and must be retained under a claim of right to hold the land against him who was seized; and the person against whom it is held must have knowledge, or the means of knowledge, of such occupation and claim of right.' This is the language of our Supreme Court in this case upon the first appeal, and upon the same points we have the decision of the Supreme Court in the case of *Polack* vs. *McGrath*, in which Justice Rhodes says: 'The statute has come to the aid of the Court in defining adverse possession, and in the section already stated has declared where the land has been protected by a substantial inclosure, or where it has been usually cultivated or improved. One-half of the cases mentioned in the eleventh section, in which the land shall be deemed to have been possessed and occupied by the

person claiming adversely under the title, founded upon a written instrument or decree, is also where land has been protected by a substantial inclosure. The statute has in these respects remained in force since its passage in 1850; and the person claiming adverse possession, who shows a substantial inclosure of the premises of which he claims the title, need not prove any further occupation, cultivation, or use of the premises. [Reads.] This is also the doctrine of many cases in this Court. Such is the definition given in our Supreme Court in these two cases of adverse possession—of that character of possession which puts the Statute of Limitations in motion, and keeps it running, so as to ripen at the expiration of five years into a perfect title."

The exception applies to that part of the instruction which purports to give the decision of this Court in *Polack* vs. *McGrath*. The objection to that part of the instruction is, that while it professes to give the definition which this Court gave of adverse possession in *Polack* vs. *McGrath*, it omits one very important part of that definition. In addition to what is set forth in the above extract from the opinion in *Polack* vs. *McGrath*, Rhodes, J., says: "If there is also proven the claim of title in hostility to that of the true owner, it will amount to adverse possession." The element of hostility, which is an indispensable constituent of adverse possession, was left out of the definition which the jury was in effect told was the definition given of adverse possession in *Polack* vs. *McGrath*. As given to the jury, it would appear that the Court in *Polack* vs. *McGrath* held that something less was required to constitute adverse possession than the same Court had held to be requisite in *Thompson* vs. *Pioche*. We think that this constituted a good ground of exception; and although the Court below, in granting a new trial, expressly limited itself to one ground, this Court is not thereby precluded from affirming the order on other grounds, if there are other grounds upon which the order should have been made.

There were exceptions to other parts of the charge given, as well as to the refusal of the Court to give instructions which the respondent requested the Court to give; but we are not prepared to say that the Court erred in other respects than that above mentioned.

Order granting a new trial affirmed.

I concur: Myrick, J.

CONCURRING OPINION.

In concurring in the opinion of my brother, Sharpstein, I desire to add that, in my judgment, the attornment of Os-

born to Moss was made under conditions which brought it within the section of the Act of 1855, referred to in the case of *Thompson* vs. *Pioche*, 44 Cal. 508, as had been held by the Supreme Court in *Leese* vs. *Clark*, 18 Cal. 535, and 20 Cal. 387, years prior to the decision in 44 Cal., and affirmed by the United States Supreme Court (*Beard* vs. *Federy*, 3 Wall. S. C. 491). The patent is record evidence of an adjudication conclusive in its character that Moss was entitled to the land sued for from the date at least of the presentation of the claim to the Land Commissioners as against all persons in the condition that Thompson was. The rule of *Leese* vs. *Clark* is, no doubt, the conclusively settled rule in this State. This patent was issued in pursuance of the judgment of a court of competent jurisdiction; and Osborn, in yielding to it, attorned in consequence of this judgment, which brought the case within the statute. This conclusion is sustained in principle by the following cases: *Mayor* vs. *Whitt*, 15 M. & W. 571; *George* vs. *Putney*, 4 Cush. 351; *Chambers* vs. *Pleak*, 6 Dana, 456; *Moss* vs. *Goddord*, 13 Met. 177; *Watson* vs. *Lane*, 11 Exch. 769; *Evans* vs. *Elliott*, 9 A. & E., 342; *Simers* vs. *Saltus*, 3 Den. 214; 5 Hill, 599; 4 *Id.* 643; 25 N. Y. 462.

But the Supreme Court, in the case of *Thompson* vs. *Pioche*, *on the same facts*, held that the attornment of Osborn to Moss was void. This decision, however erroneous, under numerous decisions of the Supreme Court of this State, constitute the *law* of the case in all of its stages. To this we must yield. I have long had much doubt as to the propriety of this rule concerning the law of the case, but it has been too long settled to be now disturbed. The case must be left to be determined according to the rules laid down, when in the former Supreme Court, on the appeal therein heard and decided.

As the case goes back for a new trial, I will add that, as to adverse possession, the law is correctly stated in the case referred to in 44 Cal. The elements of such a defense are there clearly set forth (see p. 517 of 44 Cal.) in that part of the opinion of the Court commencing with the words, "To constitute adverse possession," down to end of the paragraph. The Court below will no doubt follow this on the retrial of the cause. The "*claim of right*" referred to is usually a mixed question of law and fact, and it should be submitted to the jury with appropriate instructions. What the instructions should be I will not venture to state in advance.

THOMPSON, J.

DEPARTMENT NO. 1.

[Filed May 19, 1880.]
[No. 6215.]

HIBERNIA SAVINGS AND LOAN SOCIETY, RESPONDENT, vs. DENNIS JORDAN, APPELLANT.

ADMINISTRATION—PRESENTATION OF CLAIMS SECURED BY MORTGAGE—WHEN BARRED. In 1872 the laws of this State required a presentation of a mortgage claim to the administrator for allowance. When the Codes were adopted in 1873, by sections 1493 and 1500 it became unnecessary for a holder of a mortgage or lien to present the same to the administrator. In 1874 those sections were amended so as to render a presentation necessary. In 1876 the sections were again amended, making a presentation unnecessary. So where a mortgage was executed in 1872 and became due in 1875, and the action to foreclose was brought in 1877, presentation of the same having never been made—*Held*, that the debt and mortgage is barred; the law as it existed when the claim became due controls, and subsequent legislation cannot give validity to the claim when already barred.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

Tobin & Tobin, for respondent.

Geo. R. B. Hayes, for appellant.

McKEE, J., delivered the opinion of the Court:

The appeal in this case is from a decree of foreclosure of a mortgage which was given by one Ellen Jobson on the 2d day of March, 1872, to secure payment to the plaintiff of the promissory note described in the pleadings. The mortgagor (Ellen Jobson) died December 28, 1872, leaving a will which was admitted to probate; and letters testamentary were issued to the defendants, who qualified and entered on the discharge of their duties, and caused publication of notice to creditors of the estate to present their claims for allowance according to law. The first publication was made on February 21, 1873.

The mortgage claim in controversy was never presented to the executors, or any of them; but on the 30th of April, 1877, plaintiff commenced the action in hand to foreclose the mortgage. In the complaint, recourse to any property belonging to the estate, other than that included in the mortgage, is waived; but the executors claim that the plaintiff's right of action to foreclosure is forever barred by reason of the failure to present the mortgage debt as a claim against the estate, and that is the question.

At the time of the death of the mortgagor, of the appoint-

ment of the executors, and of the publication of notice to creditors, the law of this State required creditors of the estate of a deceased to present their claims to the executor or administrator of the estate, on pain of being barred. By section 130 of the old Probate Act it was enacted as follows:

"If a claim be not presented within ten months after the first publication of the notice, it shall be barred forever; provided, if it be not then due, or if it be contingent, it may be presented within ten months after it shall become due or absolute."

Co-existent with that section, section 136 declared:

"No holder of any claim against an estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator."

Those two sections continued to be the law of the subject under consideration until the Codes went into effect on the first day of January, 1873, and the declaratory sections 1493 and 1500 of the Code of Civil Procedure took their place. By section 1493 it was declared as follows:

"If a claim is not presented within the time limited in the notice, it is barred forever, except as follows: If it is not then due, or if it is contingent, it may be presented within one month after it becomes due or absolute. When it is made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the Probate Judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the State, it may be presented any time before a decree of distribution is entered. A claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged, must be presented within one month after such deficiency is ascertained."

And section 1500 declared that—

"No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

But on the 25th of March, 1874, sections 1493 and 1500 were amended so as to read as follows:

"SEC. 1493. If a claim arising upon a contract heretofore made be not presented within the time limited in the notice, it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute, if it be made to appear by

the affidavit of the claimant, to the satisfaction of the executor or administrator and the Probate Judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the State, it may be presented any time before a decree of distribution is entered. A claim for a deficiency remaining unpaid after a sale of property of the estate mortgaged or pledged, must be presented within one month after such deficiency is ascertained. All claims arising upon contracts hereafter made, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the executor or administrator and the Probate Judge, that the claimant had no notice, as provided in this chapter, by reason of being out of the State, it may be presented at any time before a decree of distribution is entered."

"SEC. 1500. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator."

Both sections were to take effect on the 1st of July, 1874.

It will be observed that section 1493, as it existed before and after July 1, 1874, required the holder of any claim to present it on pain of being barred. If he wished, as a creditor of the estate, to secure payment of his claim out of the assets of the estate, he was bound to make presentation within the time prescribed. That was the law as it stood on the 2d day of March, 1875—the day that the mortgage debt in this case became due; and by the law the plaintiff had thirty days after it became due to make presentation of it. The thirty days expired April 2, 1875; and, as has been already said, the debt and mortgage in controversy never were presented to the executors, or any of them. As a claim against the estate, the debt and mortgage were therefore, according to the express provisions of section 1493, forever barred, unless it be that the law, as it existed during the administration of the estate, before the time of the bar of the statute had expired, did not impose upon the plaintiff the duty of presenting the debt and mortgage at all.

But the word "claim," as used in the law which was in existence before and after July 1, 1874—the date when section 1493 as amended took effect—comprises all debts and rights of action, all claims which existed at the time of the death of deceased, and could be asserted after his death against his estate in a court of equity. A mortgage debt created by a deceased person in his lifetime, whether it be

due at the time of his death or thereafter, is one which may be asserted in a court of justice after his death; therefore it is a claim within the intent and meaning of section 1493, and must be presented. Presentation is required for two purposes—first, to secure payment of the debt out of the assets of the estate (an executor or administrator, as trustee of an estate, is entitled to know what debts and legal obligations exist against the estate, so that he may prepare to apply the assets in his hands to their discharge in the course of his administration); and secondly, presentation is necessary to keep alive the remedy upon the debt, and so to uphold the remedy upon the mortgage. (*Fallon* vs. *Butler*, 21 Cal. 24; *Willis* vs. *Farley*, 24 *Id.* 490; *Pitte* vs. *Shipley*, 46 *Id.* 154; *Harp* vs. *Callanan*, 46 *Id.* 222.)

If the mortgage debt be not presented, it is barred, and the remedy upon the mortgage is also barred; for as the mortgage is but the incident of the debt whose payment it is given to secure, whatever bars the remedy upon the debt is effectual as a bar to the remedy upon the mortgage. (*Lord* vs. *Morris*, 18 Cal. 482; *Heinlin* vs. *Castro*, 22 Cal. 100; *McCarthy* vs. *White*, 21 *Id.* 495.)

Attack is made upon section 1493, upon the ground that it is unconstitutional because it is said to be too restricted as to the time for enforcing the remedy upon claims to become due, and because it is retroactive upon vested rights of the plaintiff in the claim itself, and therefore impairs the obligation of the contract.

But when the corporation plaintiff took the note and mortgage in suit, it did so not only in view of the law as it then existed, but subject to the legal effect which the death of the mortgagor might have upon the remedies applicable to the note and mortgage. The rights and duties of parties to a contract are, of course, fixed by the terms of the contract itself: these cannot be changed by any legislation. But when the note and mortgage were given, the law which required presentation to be made of them, in case of the death of the maker, existed and entered into them as part of the contract itself; and no obligation of the contract is therefore impaired by that requirement, for it is one which relates merely to the remedy, and the remedy for enforcing all contracts—past as well as future—is subject at all times to the control of the Legislature. That body must, of course, exercise its powers within constitutional limits. It cannot pass a statute of limitations which would deprive a person of all remedy, or restrict him unreasonably in time for availing himself of the remedy which is given. Time for the assertion of a right for

enforcing the collection of a legal demand by judicial proceedings, which the Statute of Limitations purports to bar, must be reasonable. But the law under consideration is not open to the objection that it deprives the holder of a claim against an estate of all remedy, or that it unreasonably limits him as to time; for presentation is itself a remedy—it is in the nature of judicial proceedings against an estate, and as a remedy it is effectual for enforcing the collection of the claim. If allowed by the representatives of the estate, a *quasi* judgment is rendered in favor of the claimant, which ripens into a final judgment when the Probate Court, in which the estate is being administered, directs it to be paid. If rejected, the law affords ample time for the purpose of suit. (Section 1498, C. C. P.) Whether it be a claim which should be allowed or rejected, the representative of an estate is entitled to know of its existence; for as trustee of the estate it is his duty to ascertain the legal demands against it, so that he may allow and settle them in due course of administration without wasting the estate in unnecessary litigation. For that purpose the holder of the claim in question could have availed itself of the legal remedy of presentation at any time before or after publication of notice to creditors of the estate of the deceased mortgagor, until the expiration of thirty days after the claim became due. It was not necessary for the plaintiff to delay presentation until it did become due. In *Ricketson* vs. *Richardson*, 19 Cal. 354, the Court says: "The statute does not require a presentation of the notes, etc., to be postponed until after publication of notice by the executors, but the holder may anticipate such publication." So that, having had all the time from the grant of letters testamentary to the executors until thirty days after the claim became due, it cannot be said that the law which required its presentation within that time is unreasonably restricted in time.

Nor did the repeal of section 1500 as it existed before July 1, 1874, divest the plaintiff of any vested right in the claim. That section related also to the remedy. It gave the holder of a mortgage debt the right to foreclose the mortgage without presentation of the claim to the executor or administrator of the estate, upon the condition that he waived all recourse against any other property of the estate. But before the claim of the plaintiff had become due, so that the plaintiff in this case could avail himself of the remedy, the Legislature repealed the law; and it is well settled that legislation that affects the remedy merely, and does not deny the right, is not open to objection upon constitutional grounds. (*Stoddard* vs. *Smith*, 5 Binn. 355; *Ogden* vs. *Saunders*, 12 Wheat. 270; *Hinkle* vs.

Piffort, 6 Barr. 196; Cooley's Const. Lim. 287.) So in *Tuolumne Redemption Co.* vs. *Sedgwick*, 15 Cal. 285, where an Act of the Legislature was passed as a substitute for a statute of redemption, the Supreme Court held that the Act repealed the old rule of redemption and provided for a new rule, and that the right to redeem was only a privilege given by statute; but, as it depended upon statute, it was a provision which might be repealed at any time. "The Legislature," says the Court, "may repeal or alter the provisions of the Act so as to affect those who have not yet availed themselves of the statutory privilege, or, at all events, who are not yet in a condition to so avail themselves."

It is true that the Legislature on the 15th of March, 1876, restored the remedy; and it is now as a remedy existent, and was at the commencement of this action; but in the meantime the claim in controversy had become "barred forever." The restoration of the remedy did not revive the claim. It was forever barred. No legislation could restore it again to validity as a claim against the estate represented by the defendants. The bar became a vested right in the estate, of which it could not be divested by subsequent legislation.

Judgment reversed, and cause remanded.

I concur: Ross, J.

CONCURRING OPINION.

I concur. The claim was never presented to the executors, and the right of plaintiff to sue accrued, if ever, at or subsequent to the date (March 2, 1875) when the mortgage debt became due. But as the law was at that date, and ever since has been, the plaintiff is expressly prohibited from maintaining the action by reason of the failure to present the claim. Nor—even assuming that the changes in the statutes are other than such as relate to the remedy—can plaintiff assert that the obligation of the contract has been impaired. At the time when the note and mortgage were executed, the law declared that no action should be maintained upon a claim which should not be presented to the executor and administrator. The plaintiff contracted with reference to the then existing law, which was substantially the same as the law in operation when the mortgage debt became due. For a portion of the period intervening between the two dates above mentioned, the statute authorized the foreclosure of a mortgage simply, although the claim which it was given to secure was not presented; but the plaintiff did not thereby acquire a vested right to maintain this action.

MCKINSTRY, J.

DEPARTMENT No. 1.

[Filed April 22, 1880.]

[No. 6716.]

E. K. GREEN, RESPONDENT,

vs.

BURDETT CHANDLER, APPELLANT.

CONFLICT OF TESTIMONY. Where there is a substantial conflict of testimony, the judgment of the lower Court will not be disturbed.

FINDINGS—WHEN OUTSIDE OF THE ISSUES, WILL NOT WARRANT A JUDGMENT. A finding outside of the issues made by the complaint and answer does not warrant a judgment.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

H. K. S. O'Melveny, for respondent.

Brunson & Wells, for appellant.

McKEE, J., delivered the opinion of the Court:

The Court below finds that the structure for which it is sought to foreclose a mechanic's lien was completed on the 5th day of October, 1874, and that the land described in the complaint and sought to be charged with the lien was required for the convenient use and occupation of the structure. Both findings are assigned as errors.

The first relates to a fact about which the record satisfactorily shows there was a conflict of testimony; and we have repeatedly held, where that is the case, that we cannot interfere with the finding of the Court below.

As to the second, the mechanics' lien law makes it the duty of the Court to determine, on rendering judgment, the the quantity of land which may be required for the convenient use and occupation of any building, improvement, or structure which may be built thereon by any one claiming a lien. (Sec. 1185, C. C. P.)

The structure in controversy was built upon a tract of land belonging to the defendant, which contains 86-100 acres. The finding of the Court is "that the whole of said parcel of land, with the appurtenances, are required for the convenient use and occupation of said mill, tank, pump, pipes, tower, and structure."

This finding is not within any of the issues made by the complaint and answer; and there was no evidence whatever given on the trial, or at the time of rendering judgment, upon which the Court could determine that the whole or any particular part of the land was required or necessary for the

use and occupation of the structure. The finding is therefore outside of any issue made in the case, and it is unsustained by the evidence. A finding outside of the issues does not warrant a judgment. (*Devoe* vs. *Devoe*, 51 Cal. 543; *Morenhaut* vs. *Barron*, 42 Cal. 605.)

It follows that the judgment and order denying a new trial must be reversed, and the cause remanded for a new trial.

Judgment so ordered.

We concur: McKinstry, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed April 23, 1880.]

[No. 6410.]

WILLIAM NEELY THOMPSON, RESPONDENT,

vs.

JAMES PATTERSEN, EXECUTOR, ETC., AND THREE OTHER CASES, APPELLANTS.

APPEAL—INSUFFICIENT STATEMENT. Where an appeal is taken from an order denying a motion for a new trial, and the statement in the transcript being imperfect was disregarded, except as to the pleadings, the referee's report and findings, and the notice of motion and order from which came the appeal, the Court will not review alleged errors which the appellant claims "are shown and illustrated by the findings and report of the referee on its face." Such errors are part of the judgment roll of a case; and there being no appeal from the judgment, and the statement being disregarded, there is no record upon which the appellant is entitled to be heard.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

Wm. Irvine, for appellants.

A. N. Drown and *J. J. Williams*, for respondent.

McKEE, J., delivered the opinion of the Court:

This case and three other cases, by an order made by the Court below upon a stipulation of the parties, were referred to a referee to take and state an account, in the first case, between the plaintiff and the defendant, and to try and determine the rights of the parties in all the cases, and "to declare the same by proper findings of fact and of law."

Pursuant to the stipulation, the referee tried the four cases, and on April 30, 1874, filed his report, findings, and conclusions of law. Defendant in the Court below gave notice of intention to move for a new trial upon a statement of the case to be prepared according to law. A statement was settled and certified by the referee, and upon it defend-

ant moved for a new trial on one hundred and sixty assignments of error. The Court below denied the motion, and from the order the defendant appealed. This appeal the respondent in this Court moved to dismiss upon the ground that the transcript on appeal was wholly insufficient, in that it did not contain certain matters of evidence which had been, by stipulation of the attorneys in the cases, used as parts of the statement of the case upon which the Court below denied a new trial. In response to the motion, the appellant filed a release of certain errors, and this Court denied the motion to dismiss the appeal; but, as it had no power to amend or add to the statement in the transcript as made in the Court below, it ordered that all of the transcript be disregarded, except the pleadings, the referee's report and findings, and the notice of motion and order from which comes the appeal in the cases. In that condition of the record the appeal has been submitted upon briefs of counsel, and we are asked to review certain alleged errors which counsel for appellant claims "are shown and illustrated by the findings and report of the referee on its face."

These alleged errors are errors of fact and of law. To review them involves an examination of the testimony which was received by the referee at the trial, for and against certain so-called "objectionable items" which were allowed in the statement of the account, and also of the evidence upon which the referee made his findings, so as to determine the legality or illegality of objections made to the allowance or disallowance of interest upon claims, and of commissions and attorneys' fees, as well as of objections to the mode of stating the account, and to the findings and report of the referee.

But errors "shown and illustrated by the findings and report of a referee on its face" are part of the judgment roll of a case; for a referee appointed to try and determine a case is, *quoad* the trial of the case, in the place of the Court; and his findings and report are the equivalent of the findings and decision of the Court itself. "When a referee," says the Court in *Harris* vs. *S. F. R. R. Co.*, 41 Cal. 393, "reports his decision upon the whole case, his report stands as the decision of the Court; when he reports the facts only, his report is as a special verdict." The findings and report of a referee are therefore part of a judgment roll of a case. (Section 670, subdivision 2, C. C. P.) But, so far as appears on this appeal, there is no judgment roll. No judgment has yet been entered in any of the cases. And even if there were a complete judgment roll in this case, the Court

could not, from an inspection of it, undertake to determine whether there was or not error apparent upon it, because there is no appeal from the judgment. It is only upon an appeal from the judgment that the Court can consider errors apparent on a judgment roll, or review the verdict or decision of a case if excepted to, or errors assigned on a statement on appeal. (*Hutton* vs. *Reid*, 25 Cal. 477; section 956, C. C. P.)

But here there is no appeal from the judgment, and no statement on appeal. The appeal which has been taken is from an order refusing a new trial. But errors of fact or of law, reviewable on such an appeal, are such as appear in a bill of exceptions or statement of the case settled in the Court below; for the motion for a new trial must be heard in that Court upon affidavits, or the minutes of the Court, or a settled bill of exceptions, or statement of the case which contains a specification of the particulars in which the evidence in the case is alleged to be insufficient, or of the particular errors of law upon which the moving party intends to rely. If it does not, it must be disregarded. (Section 659, C. C. P.) Specification of grounds of error is therefore the essence of a statement or bill of exceptions on motion for a new trial, without which it has no legal existence; and upon an appeal from the order granting or refusing a new trial, the statement or bill of exceptions, as it was used on the hearing in the Court below, must be brought to this Court in the transcript on appeal (sections 952 and 611, C. C. P); for it is only upon the record which was considered in that Court that this Court can act. We have repeatedly held we can only act upon a transcript of the record as it exists in the lower Court, duly authenticated in the mode prescribed by law. (*Bonds* vs. *Hickman*, 29 Cal. 461; *Boston* vs. *Haynes*, 31 Cal. 107; *Buckney* vs. *Whitney*, 24 Cal. 261; 28 *Id.* 555; *Satterlee* vs. *Bliss*, 36 Cal. 520; *Quivey* vs. *Gambert*, 32 Cal. 306.)

When therefore the so-called statement in the transcript on appeal in these cases was found to be in such an imperfect condition that it had to be disregarded, there was nothing left in the record containing any grounds of error for review by this Court on the appeal from the order denying a new trial. There is therefore no record upon which the appellant is entitled to be heard; no errors which this Court can review. (*Hutton* vs. *Reid*, *supra*; *Kimball* vs. *Semple*, 31 Cal. 658.)

Order affirmed.

We concur: Ross, J., McKinstry, J.

Supreme Court of the United States.

OCTOBER TERM, 1879.

[No. 70.]

WILLIAM NEWTON MEEKS, PLAINTIFF IN ERROR,

vs.

ROBERT OLPHERTS, MICHAEL COSTELLO, J. J. HUCKS, W. P. GHEEN, ET AL.

1. The statute of California which requires an action for real estate sold by order of a Probate Court, which action is adverse to the sale, to be brought within three years after such sale, applies to an administrator who made the sale as well as to the heirs, because the right of action is in the administrator and is not in the heirs.
2. When the action is barred by lapse of time against the administrator, it is also barred against the heirs, because the right of possession is, by the law of California, in the former; and when the bar is complete against him, it is also perfect against the heir whose interest is represented by the administrator.

In error to the Circuit Court of the United States for the District of California.

MILLER, J., delivered the opinion of the Court:

The action in this case was brought in the Circuit Court for the District of California by plaintiff in error to recover possession of a hundred-vara lot in the city of San Francisco.

The case was submitted to the Court on a stipulation waiving a jury; and on the findings of fact by the Court now in this record, it further found as a conclusion of law that plaintiff was barred by section 190 of the Probate Act of the State, and gave judgment for defendants.

The material facts in the case are few, and easily understood.

George Harlan, who died intestate July 8, 1850, was then seized of the title to the lot in question, except as that may have been nominally in the United States; and by the Act of Congress of 1864 the title so held by Harlan was confirmed, and inured to the benefit of any one rightfully holding under him.

On the 19th of August, 1850, Henry C. Smith was duly appointed administrator of Harlan's estate; and having afterwards resigned, Benjamin Aspinall was appointed in his place June 15, 1855.

On the 7th day of January, 1856, Aspinall, by an order of

the Probate Court, sold the lot in question with many others; and under this sale defendants, or those from whom they claim, entered into possession, which they have held uninterruptedly to the present time. Aspinall remained administrator until May 12, 1864, when he settled up his accounts and was discharged, and Joel Harlan and Lucien B. Huff were appointed in his place, and are administrators now.

On the 6th of November, 1869, an order of distribution of the estate was made in the Probate Court, by which the lot in question was distributed to plaintiff. To this proceeding no objection is made as to its regularity. He brought the present action in 1872.

It will thus be seen that the defendants had purchased the lot in controversy at a sale ordered by the Probate Court, and had paid their money for it and been in the peaceable adverse possession of it since 1856, a period of sixteen years; and the Court held that whether the probate sale was valid so as to confer title or not, the Statute of Limitations applicable to such cases was a bar to plaintiff's right of recovery.

As the only question in the case is the one thus stated by the Circuit Court, and as the Supreme Court of California had decided that the probate sale was invalid and conferred no title, we proceed to examine the defense of the statute.

The special Statute of Limitations of three years, contained in the Probate Act of California, is as follows:

"SEC. 190. No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale.

"SEC. 191. The preceding section shall not apply to minors or others, under any legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability."

As the plaintiff in this case claims title as heir and by purchase from other heirs of the decedent, and brings his suit sixteen years after a sale by an administrator, sanctioned by a Probate Court, it would seem at first blush that the case came within the provision of the first section.

Counsel for plaintiff, however, has argued with much earnestness and force—

1. That no suit could be brought by the heirs, or any one claiming through them, until the order of distribution was

made, because until that time, or until administration was closed, the right of possession was in the administrator.

2. That until then the heirs were under a disability, which by section 191 protected their right of action from the operation of section 190.

The first proposition, and indeed the argument of the learned counsel concedes, that by virtue of the statutes of California the real estate of a person dying intestate comes to the possession and control of his administrator as personal property does; and that while the administrator can only sell real estate upon an order of the Probate Court, the possession and control, the reception of the rents and profits, and the right to sue to recover possession of it when held adversely, belong solely to the administrator. Indeed, a section or two of the Probate Act, which we copy, makes this very plain.

"SEC. 114. The executor or administrator shall have the right to the possession of all the real as well as the personal estate of the deceased, and may receive the rents and profits of the real estate until the estate shall be settled, or until delivered over by the order of the Probate Court to the heirs or devisees, and shall keep in good tenantable repairs all houses, buildings, and fixtures thereon which are under his control."

"SEC. 195. *Actions for the recovery of any property, real or personal, or for the possession thereof*, and all actions founded upon contracts, may be maintained *by and against executors and administrators* in all cases in which the same might have been maintained by or against their respective testators or intestates."

And by section 194 of the Probate Act of California the administrator is again required to "take into his possession all the estate of the deceased, real and personal."

While it must be conceded that no right of action existed in the heirs of Harlan until the order of distribution, the reason of this is that the right of action to recover possession of the lots wrongfully held under the invalid probate sale was in the administrator. He was the representative of the rights of the heirs and of the creditors of the estate, and as such had the same power to sue for and recover the lot as if he had been the intestate himself. Not only was it his right, but it was his exclusive right and his duty. For any failure to perform this duty he laid himself liable to the heirs or any one else injured by that failure.

Nor can it be said that either this right or this duty to sue for and recover possession of the lot was lost or abridged by

his sale as administrator to the defendants. Instances are numerous of persons making sales that are invalid, avoiding them by the very act of bringing an action of ejectment. Such are the cases of infants and married women who have made conveyances and received the consideration, whose acts are void or voidable by reason of infancy or of defective acknowledgments of the deeds.

There was, then, up to the date of the order of distribution, or until it was barred by the statute, a right in the administrator of the estate of Harlan to sue for and recover the possession sought in the present action.

This being so, it is not easy to perceive why that right of action was not barred in three years from January 7, 1856, the day on which defendants purchased and took possession. This would make the bar complete January 7, 1859. During all that time Aspinall was administrator, and for five years afterwards; and nothing obstructed his legal right to sue for and recover the possession. Nor is the case otherwise if the right of action began with the relinquishment of title by the Act of Congress of 1864.

It is argued, however, that section 190 does not apply to suits brought by the administrator, and therefore the statute does not run against the right of action while it remains in him.

The argument is that the language used—namely, "no such action shall be maintained by *any heir or other person* claiming under the deceased testator or intestate"—means by an heir or one holding under the heir, and that the words "other person" do not include the administrator.

But no sufficient reason is to be found why it should not. If the administrator can by such an action avoid his own irregular or void sale, the reason for limiting the time within which it should be done by him is as strong, or perhaps stronger, than it is against another.

It is as important to the purchaser—for whose benefit the statute was enacted—that he should be protected against the administrator as against the heirs. The words "other person" mean some one other than the heirs; and instead of meaning some one like the heirs or claiming under the heirs, the words expressly refer to some one "claiming under the deceased testator or intestate." These last words are unnecessary in reference to heirs, for they can claim in no other way but under the intestate. The words "other person," therefore, almost of necessity refer to the administrator; for they can refer to no one but the heirs or some one claiming under them, or to the administrator.

He is therefore within the spirit and the literal meaning of that section, and the bar is good against him. This was decided in the case of *Harlan* and *Huff* vs. *Peck*, in the Supreme Court of California, 33 Cal. 575. Harlan and Peck, as we have already seen, were the successors of Smith and Aspinall as administrators of George Harlan's estate. They brought suit to recover one of the lots sold by Aspinall at the same time with the sale in question in this case. The defendants relied on the sale and the limitation of section 190 of the Probate Act. The Court below gave judgment for plaintiffs; but the Supreme Court, while it held the sale void, reversed the judgment on the ground that this Statute of Limitations barred the administrator. This is a construction of the statute by the highest Court of the State.

The legal disability mentioned in section 191 manifestly has reference to a well-known class of persons in whom a right to redress exists, but who for special reasons are incapable of acting for themselves—such as infancy, coverture, and the like. Whatever is a disability under the general Statute of Limitations is a disability under this statute. Section 352 of the Code of Civil Procedure of California describes this class, among which are minors, *femmes covert*, insane persons, and persons imprisoned; and it decribes them as persons *entitled* to bring an action. The disability cannot have reference to a person in whom no right of action exists. Such use of the term disability is without support in reason or precedent.

The right of action on the title which the plaintiff now asserts was in the administrator; and the statute, therefore, ran against him and against all whose rights he represented. "In all suits for the benefit of the estate, he represents both the creditors and the heirs," said the Supreme Court in *Beckett* vs. *Selover*, 7 Cal. 239.

Whatever doubt may have existed at one time on the subject, there remains none at the present day, that whenever the right of action in the trustees is barred by the Statute of Limitations, the right of *cestui que* trust thus represented is also barred. This doctrine is clearly stated in "Hill on Trustees," side paging 267, 403, 504; and the authorities their cited fully sustain the text, both English and American.

Among those specially applicable to this case are *Smilie* vs. *Biffer*, 2 Barr's Pa. R. 52; *Couch's Heirs* vs. *Couch's Administrator*, 9 B. Monro, 160; *Rossen* vs. *Anderson*, *Idem*, 423; *Darnall* vs. *Adams*, 13 B. Monro, 273.

In the first of these cases, land was devised to executors with a power of sale, which was imperfectly executed by one

of the executors alone. The legatee brought suit against the purchaser, and was held to be barred by the Statute of Limitations. After referring to the old opinion, and expressing surprise that it should ever have been entertained, and showing how it was overruled by Lord Hardwicke in *Lewellen* vs. *Mackworth*, 2 Equity Cases Abridged, 579, the Court says: "Therefore, where *cestui que* trust and trustees are both out of possession, for the time limited the party in possession has a good title against both. By the terms of the will, the trustee had the right to enter on the land to take the rents, issues, and profits, and apply the same to the separate use of Jane Craig, the testator's daughter, during her natural life, with power to sell the fee simple and appropriate the interest of the purchase money to her use, and after her death to be paid to certain legatees, of whom the present plaintiff was one. The properety was sold in the lifetime of Jane Craig, but the sale was the act of but one of the trustees, and it is contended that the execution of the joint trust must be the act of all. In this respect, the title of Nicholson, the purchaser, is manifestly defective. But Nicholson took possession of the premises in pursuance of the contract, and held the same for upwards of twenty-one years. He therefore held adversely to both *cestui que* trust and trustee, and consequently obtained by the Statute of Limitations an indefeasible title, which cannot now be disturbed or gainsayed."

In the case of *Rosson* vs. *Anderson*, 9 B. Monro, 423, the question related to the title of slaves conveyed by a father to a trustee for his daughters. The trustee did not accept the trust, nor were the slaves ever delivered by the donor.

One of the grand-daughters, after her father's death, which occurred while she was a minor, brought suit for the slaves, and was met by a plea of the Statute of Limitations, to which she replied her infancy.

The Court held that the right of action, on the death of her father, vested in his executors; and as more than five years had elapsed after they had qualified as such, the statute was a bar against them; and as they would have been barred by the statute, so was the heir, though a minor when the cause of action accrued.

In *Darnall* vs. *Adams*, which concerned a devise of slaves, the same Court held that the disability of coverture in the devisee could not prevent the running of the Statute of Limitations in favor of an adverse possession against the executor, and that it was well settled that the claim of the devisee is, under such circumstances, barred by the lapse of time which

bars the executor. *Coleman* vs. *Walker*, 3 Metcalf's Ky. R. 65, and *Edwards* vs. *Woodfolk's Administrator*, 17 B. Monro, 376, are cases which assert the same doctrine; and in the latter the principle is fully and ably discussed, and its soundness well maintained.

A very strong case of the same character is that of *Croxall* vs. *Sherrard*, decided in this Court (5 Wall. 268), where a remainderman was held barred by a Statute of Limitations of New Jersey, on account of the number of years of possession of defendant under purchase from the holder of the estate for life, all of which had elapsed during that life. This was held to be a bar, though the remainderman brought suit immediately on the death if his ancestor. This was, however, based on the peculiar wording of that statute.

In the case of *Cunningham* vs. *Ashley*, 45 Cal. 485, it was held that an administrator who is a party to a suit which involves the title of his intestate to real estate, represents the title which the deceased had at the time of his death, and the judgment in such action concludes the adverse party and the heirs of the intestate. And such judgment is an estoppel as to the title set up in the action.

On the whole, we are of opinion, both upon sound principles of construction as well as upon the decisions of the Supreme Court of California upon the statute of the State, that the Circuit Court was justified in holding that the plaintiffs were barred by the adverse possession of defendants; and the judgment of that Court is affirmed.

Book Notice.

COMMENTARIES ON MORTGAGES AND VENDORS' LIENS. By HENRY M. HERMAN, author of "Treatise on the Law of Estoppel," "Chattel Mortgages," "Real Estate Mortgages," etc. Albany: W. C. LITTLE & Co., publishers, 1880.

The good reputation already enjoyed by the talented author of these commentaries should be sufficient proof in itself, without further investigation, of the value of a work upon which he has bestowed his talents and labors. The work before us seems to be exhaustive. It is compiled in two volumes of eight books. It is designed to embody the result of all the English and American authorities appertaining to the subject. The arrangement and method of the work is satisfactory.

Legal Facetiæ.

"THE Court orders you to conclude," said a judge to a tedious lawyer. "Very well, your Honor, then I conclude that the Court shall listen to me."

A WELL-KNOWN lawyer being perplexed over a point of law, called at the office of a brother attorney to consult him upon it. The latter remarked, with dignity, that he usually had pay for his advice. "Then," said lawyer one, extending fifty cents, "tell me all you know, and give me back the change."

COUNSEL: How large should you say this pan of which you speak was?—Witness: A four-quart pan, I should say.—What do you mean by a four-quart pan?—A pan that holds four quarts.—Wine or beer measure?—Wine; no, beer: I guess it's beer: I won't be certain.—But you think it's beer. What is the shape of a four-quart pan?—Round.—Like a ball?—No; like a—like a barrel.—Round like a barrel?—Yes.—Well, is a four-quart pan tall or short?—It don't make any difference.—If a pan was four inches across the bottom and twelve inches tall?—It wouldn't be a pan at all; it would be a pail.—Then a pan can be a pail?—Why, no.—But you just said so. Was there a hole in this pan?—Yes; a little hole.—In the bottom or top?—Of course there wasn't any in the top.—Then how could anything be poured into the pan?—Oh, I forgot; the top is all hole.—And the bottom?—Is all pan.—That will do. "You see, gentlemen of the jury, the witness has no idea of a four-quart pan at all," and the jury having been awakened by the sheriff, nod off again in acquiescence.—*World.*

JUST at the close of the "late unpleasantness," when princely fortunes had been swept away, two distinguished lawyers in Alabama formed a partnership. One was an ex-judge, the other had been a member of the United States and Confederate Congresses, and neither of whose disabilities had then been removed. In discussing their changed financial status, and the probability of building up a practice and of obtaining pardons, one of them remarked: "Well, John, it seems now as if we would land either in the poor-house or the penitentiary." A few days afterwards the new firm received for collection a claim for four thousand dollars. After much difficulty a compromise was effected, by which one-half of the original amount was collected. A fee of one thousand dollars was retained, and as one of the partners was dividing this, the first fruits of their labor, with the other, he said, "Jim, this don't seem much like we are on our way to the poor-house, does it?" "No," replied Jim, "but d———d if it don't look like we had started to the other place." —*Southern Law Journal and Reporter.*

Pacific Coast Law Journal.

VOL. V. JUNE 5, 1880. No. 15.

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Current Topics.

THE supplement accompanying this number contains in full the elaborate and able opinion of his Honor Judge CRANE, of the Superior Court of Alameda County, in *Crowley* vs. *Davis*. The defendant, Davis, is president of the Alameda and Santa Cruz system of narrow gauge railroads, which connect by ferries with San Francisco; and the franchise to use Webster Street, in Oakland, was granted to him with the understanding that he would extend his system into the city of Oakland, and thus furnish competing ferry and railroad lines to San Francisco; and the case therefore excited much interest in Oakland. The decision contains the first judicial interpretation in this State of the clause in our new Constitution that "private property shall not be taken or *damaged* without compensation first made to the owner," etc. The case was fully argued by Messrs. Foote, Vrooman & Davis, and Martin, for plaintiff; and by Messrs. Greathouse & Blanding, the railroad and corporation attorneys, for Davis.

IN order to save time, we are prepared to exchange with our subscribers—upon payment of one dollar for binding and the postal charges—bound for unbound volumes of the PACIFC COAST LAW JOURNAL; providing the unbound numbers are in good condition, not soiled, etc. Missing numbers furnished at 12½ cents per copy.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed May 1, 1880.]

[No. 6909.]

ADELAIDE ALEXANDER, RESPONDENT,

vs.

E. BOUTON AND MARGARET F. BOUTON, APPELLANTS.

MARRIED WOMAN—WHEN HELD AS PRINCIPAL. Where a married woman executes a note jointly with her husband, she will be held as a principal, nothwithstanding she signed the note to enable the husband to borrow money to pay his debts, if the payee had no knowledge of such purpose.

IDEM—POWER TO CONTRACT. Unconnected with separate property of her own, a married woman is in this State under disability to contract; but contracts made respecting her separate property may be enforced. And where she executes a note, and secures the same by mortgage on her separate property, she is liable for any deficiency in case the mortgaged premises prove insufficient to pay the note.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Thom & Ross, for respondent.

Brunson & Wells, for appellants.

McKEE, J., delivered the opinion of the Court:

Defendants in the Court below, on the first of September, 1877, made the promissory note and executed the mortgage which constitute the subject matter in controversy in this case. The defendant E. Bouton, since the execution of the note and mortgage, has been adjudicated a bankrupt. As a defense to the action, the defendant Margaret, in her answer to the complaint, alleges that, at the time of the execution of the mortgage, she was a married woman and the wife of the co-defendant; that her husband was at that time in debt; and for the purpose of enabling him to borrow money from the plaintiff to pay his indebtedness, she became security to him for the extent of her separate property; that of the money which her husband received from the plaintiff she had had no portion, but that her husband received and applied it all to the payment of his debt. No portion of it was applied to her use and benefit, or to the use and benefit of any of her separate property; that the plaintiff knew that she signed the promissory note only as a surety, and with knowledge of that fact had taken an agreement in writing from others to pay any deficiency in case the mortgaged premises should, after foreclosure and sale, prove insufficient to satisfy the mort-

gage debt; and that, in consideration thereof, the plaintiff agreed to release her from any judgment for insufficiency.

At the trial the promissory note and mortgage were offered in evidence. The one was signed by the husband and wife, and the other was also executed by them in the mode prescribed by law. By the promissory note, both, jointly and severally, promised to pay to the plaintiff or to her order the sum of $2,000 one year after date, with interest at the rate of one per cent. per month, etc. By the mortgage, both also jointly and severally covenanted to pay to the plaintiff the promissory note when it became due, and all assessments and liens which might be laid or imposed upon the mortgaged property during the existence of the mortgage.

It does not appear by the promissory note or mortgage that the mortgaged premises were the separate property of the wife; but at the trial of the case the wife testified that they were her separate property; that the husband, in substance, testified that he and a friend, by representations or statements made to the wife, induced her to consent to mortgage her property for the purpose of enabling him to borrow the money from the plaintiff, and that she signed the promissory note and executed the mortgage with the understanding that she was only to furnish the security, and incur no personal liability. It also appears by the testimony of the husband that when he received the money from the plaintiff he applied it to the payment of a debt which he owed jointly with one Crawford; that no part of the money went to his wife, nor was any of it applied to her use or benefit, or used for the betterment of any of her separate property. The testimony also shows that the agent of the plaintiff refused to make the loan to the defendants upon the security which they offered, unless other parties would agree to pay any deficiency which might remain after a foreclosure sale of the mortgaged property. Parties who were friends of the defendants, thinking that the security was perfectly good, agreed in writing with the plaintiff to that effect. But the agreement was made solely with the plaintiff. The defendants were not parties to it; nor was it made for their benefit, or for the benefit of either of them; and the plaintiff made no promise or agreement with the defendants, or either of them, that, in consideration of that agreement, she would release the defendant Margaret from a judgment for such deficiency.

We think it is evident that the defendant Margaret was not induced to join her husband in making the contract with the plaintiff by anything which was said or done by the plaintiff or by her agent. Neither participated in any of the statements

or representations which were made to her by her husband, nor did either of them know that such statements had been made. After having been persuaded by her husband, the defendant consented to join him in the transaction as a surety, and to mortgage her separate property for that purpose; and when she signed the note and executed the mortgage, she *believed* that she was doing so as a surety for her husband. But neither she nor her husband so informed the plaintiff or her agent. Nor did either of them know that she joined her husband in making the contract otherwise than as a principal. It is true the plaintiff dealt with her as a married woman. That fact was known to the plaintiff and her agent, for the mortgage itself revealed it. But when a married woman makes a contract with another, which she is authorized by law to make, the legal presumption is that she contracts as a principal; and in an action at law or in equity, with reference to it, if she contracted otherwise than as a principal, it is incumbent upon her to prove it; for as she possesses by law all the rights, she is subject to all the duties of a contracting party.

As a principal, then, the defendant Margaret became bound by her contract with the plaintiff if she had capacity to make it at all.

A married woman, unconnected with separate property of her own, is in this State under disability to contract. She may hold property jointly with her husband in community as tenant in common or as joint tenant; but her interest in the community property she holds in subjection to her husband. As head of the family, he is entitled to the management and control of such property. He may dispose of it without the consent of his wife; and it is not liable in law for any contracts which may be made by her after marriage, unless by his consent manifested according to law. It is otherwise as to the wife's separate property. That belongs exclusively to her; her husband has no interest in it. She has the absolute right to use and enjoy it, and the rents, issues, and profits thereof, and to dispose of the same, by her own act and deed, without the consent of her husband. She is, as to her separate property, considered a *femme sole*, and she may make any contract respecting the same with her husband or any one else competent in law to contract. It is primarily liable for any or all of her contracts made before or after her marriage; and to the full extent of it she is bound for the performance of the obligation which she has incurred by reason of any of them. The separate property of her husband is not liable for any of her contracts made before her mar-

riage; the Code has especially exempted it from liability for contracts of that character. Her creditors must look, first of all, to her separate property for the satisfaction of her contracts, whether made before or after marriage.

There is no question, then, as to the validity of the defendant Margaret's contract. It is one which she made respecting her separate property as a principal, jointly with her husband, and being valid may be enforced against her by any of the remedies known to the law. As a *femme sole* she may sue and be sued on her contract; and judgment may be rendered for and against her, and be enforced by the process of courts, in any action at law or in equity which she may bring or defend.

It was competent, therefore, for the Court below in this action to render judgment against the defendant Margaret for the amount which was due the plaintiff, and to direct a sale of the mortgaged property; and if after sale it appeared that the proceeds were insufficient, and a balance still remained due, to docket the judgment for said balance against her, according to section 726 of the Code of Civil Procedure; for, being personally liable on her contract as a *femme sole*, judgment recovered thereon becomes a lien on her separate real estate, and may be enforced as in other cases in which execution may issue. (*Marlow* vs. *Barlew*, 53 Cal. 456.) Any judgment rendered against a married woman made upon a contract respecting her separate property may be enforced against her separate property. (*Van Maren* vs. *Johnson*, 15 Cal. 311.) A partial performance of the obligation of her contract does not extinguish it. It continues to exist until it is fully performed or released, and until it is fully performed it may be enforced.

Judgment and order affirmed.

We concur: Morrison, C. J., McKinstry, J.

(Mr. Justice Ross being disqualified did not participate in the decision of this cause.)

DEPARTMENT No. 1.

[Filed May 4, 1880.]

[No. 6796.]

LONG, ASSIGNEE, vs. SERRANO ET AL.

By the Court:

On the authority of *Stearns* vs. *Aguirre*, 7 Cal. 443, and cases subsequently decided, the judgment is reversed and cause remanded.

DEPARTMENT No. 1.

[Filed May 25, 1880.]

[No. 6349.]

R. W. SARGENT, RESPONDENT,

vs.

THE LINDEN GRAVEL MINING CO., APPELLANT.

PRACTICE AND PLEADING—EXPRESS AND IMPLIED CONTRACTS—INSTRUCTIONS. Where the counts in a complaint are in *indebitatus assumpsit*, and founded on a contract to pay for work and labor done, and the evidence shows that there was no *express* contract to pay, instructions to the jury based upon the theory of an *express* contract is erroneous.

Appeal from the District Court of the Eleventh Judicial District, Eldorado County.

W. W. Likens and *Geo. G. Blanchard*, for respondent.

Charles F. Irwin, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

The complaint in this case contains two counts; the first averring that on the 15th day of November, 1877, the defendant was indebted to the plaintiff in the sum of $873.43, balance due on an account for work and labor done and services rendered by plaintiff to the defendant, at defendant's special instance and request, in and about a certain mining claim, between the 6th day of June, 1876, and the 15th day of November, 1877; and the second is substantially the same, with the additional averment that the work and labor done and services rendered were reasonably worth the sum of $873.43. The case was tried before a jury, and a verdict was rendered in favor of plaintiff for the amount claimed. The appeal is taken from the judgment and order of the Court denying defendant's motion for a new trial. Numerous errors are assigned on the appeal, only one of which will be noticed, and that is sufficient to call for a reversal of the judgment.

When the evidence was closed, and before the cause was submitted, the Court below, at the request of the plaintiff, gave the following instruction to the jury:

"If the plaintiff went upon the defendant's mine to work in June, 1876, with the understanding and consent with defendant that he should take what is called 'bedrock' pay, and that the meaning of 'bedrock' pay is that plaintiff should receive reasonable wages or pay from the mine itself, without looking to the company personally, and that plaintiff with this understanding and consent was compelled, with the

knowledge of defendant, to sink a shaft and run drain drifts, which is dead work, and did run such drain drifts, tunnel, and sink shafts at considerable expense, then, if the defendant discharged plaintiff before he had taken out reasonable wages or pay without any good cause, it is liable to plaintiff for such reasonable wages, less the amount he has received from said mine prior to such discharge."

It seems to us that the theory of the plaintiff's case, suggested and presented by the foregoing instruction, is a substantial departure from the case made by the pleadings and the evidence. As already stated, the complaint contains two counts, both of which are in *indebitatus assumpsit*, and founded on a contract to pay plaintiff so much money for work and labor done and performed by him at defendant's special instance and request; and the evidence offered by the plaintiff was introduced for the purpose of sustaining this theory.

The plaintiff testified on the trial as follows: "There was no agreement between me and the trustees relative to my working the mine. I had no express agreement with the trustees is what I mean by not having an agreement; but they knew that I was at work, and made no objection. One of the trustees worked with me, and others were anxious to know the progress we were making in working the mine. There was no express understanding or agreement between me and the company as to how much *I was to receive, or how I was to receive it*, prior to July 5, 1877. Since July 5, 1877, the understanding was that those who desired could continue to work the same as before, and should receive two dollars and a half per day when it came out from the proceeds of the mine, after first paying the working expenses, it being provided that we were to continue to have work. No time was specified that we were to have work. The only chance for me to get my pay was to be out of the mine. My understanding of the agreement was that we were to continue to work until we got our pay."

There is no pretense that any agreement to pay the plaintiff out of the proceeds of the mine was made prior to the 5th day of July, 1877; and the ground upon which plaintiff based his right of recovery for services rendered by him before July 5th was that he worked upon defendant's mining ground with the knowledge of the officers of the company. If the plaintiff performed work and labor upon the defendant's mine under circumstances which would make the company liable, that liability would simply be to pay plaintiff what such services were reasonably worth. But the instruction of

the Court went upon an entirely different theory of the case; and by it the jury was told that if the agreement was that plaintiff was to be compensated for his services from June, 1876, down to November, 1877, out of the proceeds of the mine, and if, before such proceeds yielded such compensation, defendant discharged plaintiff without good and sufficient cause, he had a right to recover what such services were reasonably worth.

The pleadings and the evidence did not authorize the instruction. There must have been an express contract between the company and plaintiff that he should be allowed to work the mine for a definite or an indefinite time, and pay himself out of the proceeds thereof (for the law would not make such a contract by implication); and it is not pretended that any such contract was made, or that any understanding to that effect existed before the 5th day of July, 1877. The Court, therefore, had no right to extend such contract back to the 6th day of June, 1876.

For the error committed by the Court in giving the instruction complained of, the judgment and order denying defendant's motion for a new trial are reversed.

We concur: McKinstry, J., Ross, J.

DEPARTMENT NO. 1.

[Filed May 26, 1880.]

[No. 6477.]

HAYNES, APPELLANT, vs. WHITE, RESPONDENT.

ACTION BY VENDEE WHILE IN POSSESSION FOR RECOVERY OF PURCHASE PRICE. An action cannot be maintained to recover back from the vendor the purchase price of lands paid under a contract to convey, upon the failure or inability of the vendor to convey title, until the vendee has surrendered, or offered to surrender, the possession of said lands, or has been evicted. He cannot hold on to the property and recover back what he has paid.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Barclay & Wilson, for appellant.

R. M. Widney, for respondent.

Ross, J., delivered the opinion of the Court:

This action, as the case is presented, cannot be maintained. The record shows that on March 1, 1876, the defendants were in possession of the land described in the complaint by virtue of a contract for its purchase from one Robinson,

who held the title to it. Upon the land there were then existing certain improvements, consisting of a house and an artesian well. On the day named the defendants executed with plaintiff the contract in writing set out in the complaint, by which the defendants agreed to sell to the plaintiff, and the plaintiff to buy of the defendants, the land in question for the sum of thirty-six hundred dollars, to be paid as follows: One hundred dollars cash, nine hundred dollars on or before two months from the date of the contract, thirteen hundred dollars on or before one year from its date, and the remaining thirteen hundred dollars on or before two years from date. The defendants further agreed that on receiving the payments at the time and in the manner stated—time being by the contract declared to be of its essence—they would execute to the plaintiff or his assigns a good and sufficient deed of the premises. There were also other covenants on the part of the plaintiff—not, however, material to be mentioned. At the time of the contract the plaintiff executed his promissory notes for the deferred payments, the last one of which, for some cause not explained, was made payable to the defendant White or order. Upon the making of the agreement, the defendants placed the plaintiff in possession of the land, including the improvements; and he has ever since remained in possession, and has received the rents, issues, and profits of the premises to a large amount. He paid to the defendants all of the installments of the purchase money except the last—namely, the $1,300—evidenced by the note made payable to White or order. This note White transferred before maturity to the defendant Thomas, and Thomas transferred it—also before maturity—to one Steele, who held it when it became due. Plaintiff knew that Steele held the note, and while it was in his possession paid him interest thereon. When the last payment became due, the plaintiff told the defendants that he was prepared to make it, and offered to them the money upon the condition that they convey to him the title to the property.

In view of the facts appearing in the record, we attach no importance to the finding that the plaintiff never offered to pay the note to *Steele*, nor to the findings in regard to the signing by the defendants of a deed "sufficient *in form*" to convey the title. The manifest effect of the contract, and the manifest intent of all the parties to it, was that in consideration of the plaintiff's money the defendants were to convey to him the title to the land—not that they should go through the idle ceremony of executing a deed "sufficient *in form*" for that purpose, when they had in fact no title to convey.

The defendants failed to comply with the contract with Robinson, and the latter, prior to the commencement of the present action, commenced suit in the Nineteenth District Court against the present plaintiff and defendants, among others, for the purpose of annulling the contract held by defendants at the time of the making of the contract mentioned in the complaint, and for the purpose of recovering possession of the property. In the action thus commenced by Robinson, these defendants filed a disclaimer of any interest or estate in the premises. They failed to comply with their part of the contract here in question, for they did not and could not convey to the plaintiff the title to the property; and the plaintiff having complied in part, and offered to complete the performance of the contract on his part, it is clear that had he surrendered, or offered to surrender, to defendants the possession of the property, he could have maintained an action against them. Instead of doing this, he retained the possession of all the property, and commenced this action to recover of the defendants "the sum of $26,012, the amount already paid by plaintiff on the purchase money for said lands, and for the sum of $1,000 damages suffered by plaintiff, and for the further sum of $2,500 damages to cover loss of improvements and the promissory note made payable to White."

It would be clearly wrong to permit the plaintiff to hold the possession of the property which he received from the defendants, and which may ripen into perfect title, and at the same time to recover back from the latter the purchase price; and it is well settled that it cannot be done. (*Morrison* vs. *Lads*, 39 Cal. 281; *Jackson* vs. *Norton*, 6 Cal. 187; *Pindy* vs. *Bullard*, 41 Cal. 444; *Truebody* vs. *Jackson*, 2 Cal. 287; *Fletcher* vs. *Mower*, No. 6258, not reported.)

Section 3306 of the Civil Code, relied on by counsel for the appellant, only declares the *measure of damages* caused by the breach of an agreement to convey an interest in real property. "The detriment," says the statute, "is deemed to be the price paid, the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price to be paid and the value of the estate agreed to be conveyed at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

But before an action can be maintained to recover this detriment, the plaintiff must have been evicted, or have voluntarily surrendered, or offered to surrender, possession.

He cannot, as already observed, hold on to the property and at the same time recover back what he paid.

The judgment and order are affirmed.

We concur: McKinstry, J., Morrison, C. J.

[Filed May 19, 1880.]

[No. 10,518.]

EX PARTE ISADOR COHN ON HABEAS CORPUS.

ADMINISTRATION—DECREE OF DISTRIBUTION MAY BE ENFORCED BY IMPRISONMENT FOR CONTEMPT. The Superior Court can enforce a decree of distribution under the provisions of the Code of Civil Procedure relative to contempt; and disobedience of an order of distribution of an estate is a contempt of court, and may be punished by imprisonment.

INABILITY TO COMPLY. Where the Court below finds adversely to the administrator upon his plea of inability to comply with the order of distribution, the Chief Justice of the Supreme Court will not be inclined to controvert such finding upon petition for *habeas corpus*.

HABEAS CORPUS. Where it clearly appears that the Superior Court had jurisdiction, and the proceedings are regular and valid upon their face, it is settled that *habeas corpus* cannot be resorted to, and that the functions of the writ, when the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the Court by which it was issued and the validity of the process upon its face.

Petition for writ of *habeas corpus*.

The petitioner complains that he is unlawfully imprisoned and confined and restrained of his liberty by one Thomas Desmond, Sheriff of the city and county of San Francisco; and the Sheriff, in his return to the writ of *habeas corpus* directed to him, shows that he holds the petitioner under commitment issued out of the Superior Court of the city and county of San Francisco in a proceeding for contempt pending in that Court.

The facts established on the hearing are that Isador Cohn, as executor of the estate of one Solomon Cohn, filed his account in the late Probate Court of the city and county of San Francisco on the 1st day of December, 1879, from which it appears that there was then due from him to the estate the sum of $5,941. This amount had been received by him in money, and should have been in his hands at the time the foregoing account was rendered.

On the 13th day of March, 1880, a petition was duly filed in the Superior Court of the city and county of San Francisco (which Superior Court has succeeded to the powers and

jurisdiction of the late Probate Court) for a partial distribution of the estate of Solomon Cohn, in which petition it was set forth and shown that Isador Cohn had then in his hands, as executor, more than $5,000 in money belonging to the estate of Solomon Cohn. And on the filing of such petition for partial distribution, an order to show cause was duly issued by the Superior Court, returnable on Monday, the 26th day of April, 1880. On the next day (April 27th) Isador Cohn was cited to show cause why an order of partial distribution should not be made in accordance with the prayer of the petition. On the 26th day of April (the day named in the citation), the hearing of the petition came up regularly before the Superior Court, and an order was thereupon entered directing Isador Cohn to pay over certain sums of money in the order mentioned, amounting in the aggregate to the sum of $5,000. This order recites, "*That more than the sum of* $6,000 *is now in the hands of said executor, Isador Cohn, the sole executor of the estate of Solomon Cohn, deceased, property of said estate, and that there are no debts.*"

The petitioner, Isador Cohn, was served with a copy of the above order or decree of the Superior Court on the 29th day of April, and a demand was made upon him to pay over the moneys held by him as executor, in accordance with the terms of the decree.

Isador Cohn neglected and refused to pay over such moneys, and an affidavit to that effect was presented to the Superior Court of San Francisco on the 29th day of April, whereupon an order of attachment for contempt was duly issued against him. In pursuance of this order, a writ of attachment was issued, and Isador Cohn was thereupon brought before the Superior Court to show cause, if any he have, why he should not be punished for contempt in failing to obey the order and decree of partial distribution; and afterwards such proceedings were had in the case that Isador Cohn was, on the 10th day of May, adjudged guilty of contempt of court.

This order recites all the proceedings had in the case, including the following: "And this Court having fully investigated the charges and premises, and having heard the answer and witnesses of said Isador Cohn, executor, to the same, has, on mature deliberation, determined that said Isador Cohn, said executor, is guilty of the charge of refusing to obey said order of partial distribution, and of a contempt of this Court in so refusing to obey said order. And it further appearing to this Court on said examination that said Isador Cohn, executor, has, before the making of said

order of partial distribution, received more than the sum of $5,000 of the moneys of said estate as such executor, and at the time of making of said order of distribution and demand had not paid out the same or any part of it to said estate, or to any person entitled to the same, it is further by this Court ordered that said Isador Cohn be imprisoned in the county jail of the city and county of San Francisco until he shall comply with said order or be otherwise discharged."

Upon this order a commitment was issued, and on the hearing of this writ all the foregoing papers and proceedings have been made a part of the return.

The first ground relied upon for the discharge of the prisoner is that he is not able to comply with the order. The petition shows that on the hearing before the Supreme Court, Isador Cohn testified that he was unable to comply with the order of partial distribution, owing to the insolvency of his affairs; that his creditors, without his knowledge, connivance, or consent, had attached all of his property and assets for money justly due them; that he had employed all the means within his power to obtain money to enable him to comply with the order or decree of distribution, but all his efforts had been fruitless and unavailing, etc. It is therefore claimed that the order imprisoning the petitioner amounts in effect to perpetual imprisonment. But this question was directly presented to the Superior Court, and that Court found that more than *six thousand dollars is now in the hands of said executor belonging to the estate of Solomon Cohn, deceased.* Was there not sufficient evidence to justify such findings? I am of opinion that there was. His account rendered in December shows a large balance then due to the estate, and no satisfactory explanation is given of the loss of the money since that time. What has become of it? Has he voluntarily and contumaciously disabled himself from doing the act required of him by the decree, and thus brought himself within the rule laid down by this Court in *Galland* vs. *Galland,* 44 Cal. 475, or is his answer a mere sham, void of all truth and utterly unreliable? Certain it is that he had the money in his possession—money held by him in a fiduciary capacity—money belonging to infant heirs of Solomon Cohn—a sacred trust, which should have been discharged by him with the strictest fidelity and the utmost good faith; and when the time arrives for him to dischage that trust, he shields himself behind the plea of disability. If the simple statement of a delinquent and dishonest executor could be heard to relieve him under such circumstances, it would be useless for courts to attempt

to enforce, by process of contempt, obedience to their orders. A faithless and dishonest trustee would always be found willing to plead such a defense, and to support such plea by a false oath. I repeat that the Court before which the matter was heard found adversely to petitioner on this plea, and that finding I am not inclined to controvert.

It is further claimed that the Superior Court had no power to enforce its decree by commitment for contempt; that the parties to whom the money was to be distributed should have brought an action for the recovery thereof. The objection to the proceeding is fully covered by the late case of *Ex parte Smith*, 53 Cal. 204. There it was distinctly held that the Probate Court could enforce a decree of distribution under the provisions of the Code of Civil Procedure relative to contempt, and that disobedience of an order of distribution of an estate is a contempt of court.

It clearly appears that the Superior Court had jurisdiction, and that the proceedings are regular and valid upon their face. These facts bring the case within the rule laid down in *Ex parte McCullough*, 35 Cal. 97, where it is said: "It is well settled that *habeas corpus* can be put to no such use, and that its functions, when the party who has appealed to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the Court by which it was issued and the validity of the process upon its face." The same is the rule found in *Ex parte Hartman*, 44 Cal. 32. The Judge there says: "The order under which the petitioner is held is regular upon its face, and one which the Court had power to make. I cannot extend the inquiry beyond this." And in *Ex parte Max*, Wallace, C. J., says: "The indictment upon which the judgment is founded is sufficient in all respects. The offense of which the petitioner was convicted was one within the scope of the indictment, and the judgment one which the County Court had authority to render upon the appearance and plea of the petitioner. These conditions constitute jurisdiction; all others involve questions of mere error, and the latter cannot be inquired into upon writ of *habeas corpus*, but only upon proceedings in error." (44 Cal. 581.)

If it be true in fact that the petitioner cannot comply with the order, and that the inability is not the result of his own willful and wrongful act, he can apply to the Superior Court for relief; and upon a satisfactory showing, that Court will doubtless do him justice.

The petitioner is remanded.

R. F. MORRISON, Chief Justice.

DEPARTMENT No. 1.

[Filed May 15, 1880.]

[No. 7055.]

SANTIAGO DE LA GUERRA, RESPONDENT,

vs.

H. M. NEWHALL AND J. M. SOTO, APPELLANTS.

PLEADING—ALLEGATION OF EXPRESS PROMISE TO PAY NOT NECESSARY. The promise to pay alleged in the common counts in assumpsit is a mere conclusion of law from the facts to be stated; and as the Code requires only the facts to be stated, they are sufficient without setting forth the conclusion of law arising from those facts. So where an *express promise* is alleged in a complaint, and the evidence fails to establish an *express promise*, it is sufficient if it contains all the averments necessary to create a legal liability on the part of the defendant; and if such averments be proved, the judgment will not be disturbed.

Appeal from the District Court of the First Judicial District, Ventura County.

Brooks & Blackstock and *W. E. Shepherd*, for respondent.
Chas. Fernald, for appellants.

MORRISON, C. J., delivered the opinion of the Court:

The complaint in this action contains two counts in *indebitatus assumpsit*; the first for pasturing 1500 head of cattle from the 20th day of March to the 5th day of May, 1877, and the second for pasturing "a large band of cattle" from the 20th day of February to the 5th day of May, 1877. Trial before a jury, and verdict for plaintiff in the sum of $900. The case is brought before this Court on appeal from the judgment and from the order of the Court below denying defendants' motion for a new trial.

In both counts of the complaint an *express promise* on the part of the defendants is alleged, but the evidence fails to establish an *express promise*, and this is the first point made on appeal. It is claimed on behalf of the appellants that it was incumbent on the plaintiff to prove an *express promise*, as such promise was averred in both counts of the complaint. Such was not the rule under the common law forms of pleadings, and is not the rule under the Code of Civil Procedure.

"No distinction exists in pleading between an implied promise and an express one. It is true that in *evidence* the law in many cases implies from certain facts that a promise has been made; but in *pleading*, the supposed promise itself should be alleged, and it is at least untechnical merely to state that which is only evidence of a promise." (1 Chitty on Pleading, 309.)

In the case of *Wilkins* vs. *Stidger*, 22 Cal. 236, the Court held that "the promise to pay alleged in the common counts in assumpsit was a mere conclusion of law from the facts to be stated; and as the Code only requires the facts to be stated, they are sufficient without setting forth the conclusions of law arising from those facts." And in the later case of *Abadie* vs. *Currillo*, 32 Cal. 174, the same thing was held by the Court.

In the case now under consideration the complaint contained all the averments necessary to the creation of a legal liability on the part of defendants. It avers ownership of the land in the plaintiff, ownership of the cattle by the defendants, the fact that they were pastured on plaintiff's land during a stated period of time, and that such pasturage was worth the amount stated in the complaint. From these facts, if proved, the law creates an implied promise and a legal liability, although the defendants' cattle were *wrongfully* on the plaintiff's land. (*Fratt* vs. *Clark*, 12 Cal. 89; *Roberts* vs. *Evans*, 43 Cal. 381.)

The appellants rely with great confidence on the fact that the evidence fails to show an express promise to pay, made by the defendants, or either of them; but, in view of the foregoing authorities, it was unnecessary for the plaintiff to prove an express promise.

The next point made in appellant's brief is that there was no evidence as to the value of plaintiff's land for pasturage, or as to what it was reasonably worth. In looking into the transcript, however, we find that several witnesses testified on this subject, and there was sufficient evidence to justify the verdict. It is true that there was a substantial conflict, but it is in just such cases that this Court has repeatedly refused to interfere with the judgment of the Court below.

It is contended on behalf of the defendants that the plaintiff is concluded from recovering in this action by reason of another action commenced by him on the 5th day of July, 1877.

It appears from the record that the plaintiff filed his complaint against the defendants in the District Court of the First Judicial District for the recovery of $10,000 damages for an alleged trespass by defendant's cattle on plaintiff's land; that a trial was duly had in said action, and a verdict was rendered therein on the 6th day of December, 1877, for the sum of $2,250 damages. It further appears that the case in which such verdict was rendered was settled on the 10th day of November, 1878, and the action was thereupon dismissed.

But the time embraced within the complaint filed on the 5th day of July is subsequent to and does not cover any of the period mentioned in the complaint in this action. The action brought on July 5th was for trespasses committed by defendants' cattle on plaintiff's land *after* May 5, 1877, and is for other and different acts from those set forth in the complaint in the case which we are now considering. It is clear, therefore, that the settlement of the case and the dismissal of the action of July 5th cannot affect the plaintiff's right of recovery in the present action.

The only remaining question in this case is, that the statement of H. G. Newhall (page 37 of the transcript) was incompetent and inadmissible. This may be conceded, but it did no injury to the defendants. It is clearly proved that the defendants' cattle were pastured on the plaintiff's land. On this point there is no conflict in the evidence; and whether the defendants expressly promised to pay for such pasturage or not, is, as we have already shown, immaterial. The plaintiff, in the absence of any such promise, was entitled to recover what such pasturage was reasonably worth.

Judgment and order affirmed.

We concur: McKinstry, J., Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed May 26, 1880.]

[No. 7022.]

M. F. THOMAS, APPELLANT,

vs.

JOHN ANDERSON ET AL., RESPONDENTS.

APPEAL—ENTRY OF JUDGMENT. No appeal can be taken from the judgment of the lower Court until after the judgment has been entered in the judgment book.

Appeal from the District Court of the Eighteenth Judicial District, San Bernardino County.

J. D. Boyer and *R. E. Bledsoe*, for appellant.

J. W. Satterwhite, *B. Waters*, and *Talbott & Harris*, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Respondents move the Court to dismiss the appeal in this case on the ground that no judgment has been *entered* in the Court below. It appears from the transcript that the case was tried before the Court; and when the Judge filed his findings of fact, the following entry was made by the clerk in

Minute Book F, page 103: "In this case, heretofore tried and submitted, the Court gives judgment for defendants. October 13, 1879."

On the 16th day of December, 1879, plaintiff gave notice of his intention to move for a new trial, and on the 2d day of February, 1880, the following entry was made in the case:

"[Title of Court and Cause.]

"The plaintiff moves the Court for a new trial on the ground specified in his notice of motion on file. The motion is submitted, and is denied. Plaintiff excepts."—Minutes of Court, February 2, 1880, Book I, page 22.

Thereupon plaintiff filed his notice of appeal from the so-called judgment and the order denying his motion for a new trial. It is claimed on behalf of the respondents that no judgment has been *entered* in the case; that the appeal has been prematurely taken, and should therefore be dismissed.

Section 670 of the C. C. P. provides that immediately after entering judgment the clerk must attach together and file the following papers, which constitute the judgment roll:

1. In case the complaint be not answered by any defendant, the summons with the affidavit or proof of service, and the complaint with a memorandum endorsed thereon that the default of the defendant in not answering was entered, and a *copy of the judgment.*

2. In all other cases, the pleadings, a copy of the verdict of the jury or finding of the Court or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer or relating to a change of parties, and a *copy of the judgment.*

It will be observed that whether judgment is entered by default or after trial, a copy of the judgment is a part of the judgment roll.

By section 661 of the same Code it is provided that: "The judgment roll and the affidavits or bills of exceptions or statement, as the case may be, used on the hearing, with a copy of the order made, shall constitute the record to be used on appeal from the order granting or refusing a new trial, unless the motion be made on the minutes of the Court; and in that case the judgment roll and a statement to be subsequently prepared, with a copy of the order, shall constitute the record on appeal."

In all cases on appeal the judgment roll shall appear in and constitute a part of the record. Section 939 of the C. C. P. provides that an appeal may be taken from a final

judgment in an action or special proceeding, commenced in the Court in which the same is rendered, within one year after the *entry* of judgment.

The question here presented is, has any judgment been entered in the case? Was the entry in the minute book of the clerk simply an order for a judgment thereafter to be entered, or was it an entry of the judgment itself?

Section 336 of the Practice Act authorized an appeal to be taken from a final judgment within one year "after the rendition of the judgment;" and in the case of *Gray* vs. *Palmer*, 28 Cal. 416, Justice Sawyer says: "The words 'rendered' and 'rendition,' and the word 'entered,' are frequently used in the Practice Act, and in no instance does the latter word appear to us to be used in the same sense as either of the former."

It has been held in a number of cases that the year within which an appeal must have been taken under section 336 of the Practice Act began to run from the time when the judgment was announced by the Court and entered upon the minutes by the clerk, and not from the time it was *entered* in the judgment book. (*Gray* vs. *Palmer*, 28 Cal. 416; *Reck* vs. *Curtis*, 31 Cal. 208; *McCourtney* vs. *Fortune*, 42 Cal. 387.) But the provision of the Practice Act on this subject has been changed by the Code of Civil Procedure; and the year within which the appeal must be taken now commences running from the date of the *entry* of the judgment, and before such entry no appeal can be taken. The precise question has been before Department No. 2 of this Court, and was there passed upon. Referring to the change in the statute by the substitution of the word "entry" in the place of the word "rendered," or "rendition," Sharpstein, Justice, says: "The Legislature must be presumed to have been familiar with the decisions, and to have had them in view when it changed the clause as above stated. It adopted the definitions which the Court had given to the two words by substituting one for the other. It in effect enacted that thereafter an appeal must be taken within one year after the *entry* of the judgment, instead of within one year after the *rendition* of a judgment." (*McLaughlin* vs. *Doherty*, No. 6378.) It was there held that a judgment is "rendered" when an order for a judgment is made by the Court, but is not "entered" until it is entered in the judgment book.

In this case no judgment has been entered in the judgment book, and the appeal was therefore prematurely taken.

Appeal dismissed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT NO. 2.

[Filed May 24, 1880.]

[No. 10,478.]

THE PEOPLE, RESPONDENT, vs. KENNEDY, APPELLANT.

BURGLARY—INTENT. In the trial of an indictment for burglary, the intent with which the defendant entered a barn must not be presumed from the *fact of stealing*.

IDEM—INSTRUCTIONS. But where the Court, after having instructed the jury "that every sane person is presumed to intend the consequences of his own acts, and that an unlawful act is done with an unlawful intent," further instructed them that the fact that a person steals while in a building is not sufficient in itself to establish the crime of burgalry, that the intent with which he entered the building must be proved by positive evidence; and was further directed that the entry into the barn did not make him guilty, and that if he stole or attempted to steal while in the barn, those facts did not make him guilty of burglary unless when he entered he had in his mind the intent to commit burglary—it is not a charge that they must find the entry with intent to steal from the fact of stealing.,

Appeal from the County Court of San Joaquin County.

Attorney-General, for respondent.

Ansel Smith, for appellant.

THORNTON, J., delivered the opinion of the Court:

The defendant was indicted for burglary committed by entering a barn owned and occupied by one J. M. Blankenship, in the county of San Joaquin, with intent to commit larceny. The trial resulted in a conviction. The defendant moved for a new trial, which was denied. This appeal is prosecuted from the judgment of the Court and the order denying a new trial.

It was admitted by the defendant that he entered the barn above referred to, to sleep; that when he got up in the morning he saw the harness there and stole it. All the evidence tended to show that he slept there during the night in question. The case turned on the intent with which the defendant entered the barn—whether or not he entered with intent to steal.

The Court distinctly told the jury that, in order to find the defendant guilty, they must find that he entered the barn with intent to steal. The Court further instructed the jury that they must, in determining this question, take into consideration all the evidence before them. As this intent had to be deduced from circumstances, the jury were directed as to the mode in which they were to consider circumstantial evidence, and as to the rules they must apply to such evidence in deducing an intent therefrom. So far there is no objec-

tion made to the directions given by the Court to the jury, and they are undoubtedly correct.

The Court further instructed the jury that every sane person is presumed to intend the consequences of his own acts, and that an unlawful act is done with an unlawful intent, and at the request of the defendant told the jury that "the mere entry into the barn or building of another is not in itself a crime."

It is contended that as the Court had in effect told the jury that the entry into the barn was not unlawful, by stating to them that it was not criminal, and had further directed them that the law presumed that an unlawful act was done with an unlawful intent—that inasmuch as the only unlawful act before the jury was that of stealing the harness—the direction of the Court was really that the law presumed from the unlawful act of stealing the unlawful intent upon which they were to find, and that the jury might have inferred from this that the presumption of the law as stated by the Court was binding upon them, and that they were thus in effect told that upon this presumption they must find the intent to exist about which they were to inquire; that substantially the jury was told that they must find the entry with intent to steal from the *fact of stealing*. If this is a proper interpretation of the directions of the Court, it is error.

But to arrive at the meaning of such directions we must look to all the directions given to the jury by the Court. The meaning of the Court below cannot be fairly arrived at by a partial view of what was told the jury was the law by which they should be governed. All that was said to them in relation to the matter should be considered. Now it appears upon such an examination as is above indicated, that the Court, besides telling the jury in its charge that they must find the intent upon a consideration of all the evidence, further instructed them, on the request of defendant's counsel, as follows:

"The fact that a person steals while in a building is not sufficient, without other circumstances proved, to cast on him the burden of proving himself not guilty of the crime of burglary.

"The intent must be proved the same as any other fact of the case must be proved, by positive evidence or by the positive evidence of facts, from which the intent shall or can be inferred."

Again, in the instruction numbered IV, which was also given at the request of the defendant, the jury was directed that if the defendant entered the barn referred to, that did

not make him guilty of burglary; if he stole or attempted to steal while in it, that the entry and the actual or attempted theft together do not make him guilty of the crime of burglary, unless when he entered he had in his mind the intent to commit burglary.

With these directions before us, we cannot conclude that the jury could have viewed the language of the Court as conveying the meaning for which counsel contends, nor do we think the jury were or could have been misled by the expression of the learned Judge referred to.

No other point is called to our attention. We find no error in the record, and for the reasons above given the judgment and order appealed from are affirmed.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT NO. 2.

[Filed May 26, 1880.]

[No. 10,434.]

PEOPLE, RESPONDENT, vs. MILES, APPELLANT.

MURDER—DELIBERATION AND INTENT. Whenever a Court attempts to give an instruction, it should be very careful not to omit any essential element of the crime. The question of deliberation and intention to commit murder must not be ignored in the instruction.

The word "concealed" is not synonymous with "lying in wait;" and where it alone is used, the instruction ignores the question of deliberation and intention.

IDEM—THREATS CONVEYED TO DEFENDANT. If the deceased had shot at the defendant less than one hour before the alleged murder, and had made threats against his life which had been communicated to him, it would not be simply a question whether the deceased was actually making a hostile demonstration at the time, but also whether the defendant, in good faith and without fault or carelessness, entertained the belief that the deceased was about to execute his threats. For if he did so believe, he would not be guilty of murder, though it turned out that he was mistaken.

Appeal from the District Court of the Thirteenth Judicial District, Tulare County.

Attorney-General, for respondent.

Brown & Daggett, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The appellant was indicted for murder, and convicted of manslaughter. He moved upon a bill of exceptions for a new trial, which was denied, and the Court sentenced him to imprisonment in the State Prison for a term of seven years.

There was evidence introduced on the trial which tended to prove that thirty or forty minutes before the homicide the

deceased and the defendant, in their respective wagons, each accompanied by two other persons, met upon the highway in the vicinity of their homes. The deceased and his friends were in a covered wagon—the latter occupying the front seat, and the former sitting upon a seat in the rear of the wagon. There was a gun in the wagon, and when the two wagons were nearly abreast, the deceased got out of the wagon, seized the gun, and fired at the defendant, but did not hit him. The horses attached to the wagon in which the defendant was riding became frightened and started to run. The defendant, however, managed to discharge a gun which he had, twice at the deceased without effect.

The defendant and his party, of which his brother was one, returned to the latter's house and put up their team. The defendant, armed with a rifle, started to go in the direction of his own house by a route which would take him by the house of the deceased. The latter soon afterwards, with his friends, returned to his house and drove into a corral; and while they were unharnessing his team he was shot by the defendant, and expired before medical or surgical aid could reach him. There was some evidence of a hostile meeting of the defendant and the deceased on the highway only a few days before the occurrences above narrated, in which they assailed each other with other than deadly weapons. The defense endeavored at the trial to make it appear that the deceased had, on several occasions, in the presence of several persons, threatened to kill the defendant, and that those threats had been communicated to him by the persons who heard them. The defendant testified that, at the time of firing the fatal shot, he saw the deceased in the act, as he (defendant) construed it, of taking his gun from the wagon for the purpose of shooting at the defendant. Among the instructions which the Court gave to the jury was the following:

"If it appears to your entire satisfaction from all the evidence, beyond a reasonable doubt, that the alleged deceased (Ananias Niles) was shot from behind by the defendant, and that the defendant at the time of the shooting was concealed behind a fence, and that there were no words, demonstrations, or hostile acts at that immediate time made or committed by the deceased, that deceased was unconscious of the fact that defendant was so concealed until he was shot down, then it is immaterial what, if any, threats or demonstrations the deceased had made at any other time or place; for such threats or demonstrations, no matter what they were, would not constitute a defense, and would not make

the act of the defendant either excusable or justifiable, but the defendant would be guilty of murder; and if the jury are entirely satisfied from all the evidence, beyond a reasonable doubt, that the facts of the case are as last above stated, then the jury will find the defendant guilty of murder, no matter whether the character of the defendant is good or bad."

This instruction is clearly erroneous. The Court instructs the jury that if the defendant did all the acts therein enumerated, that then the defendant was guilty of murder. Whenever a Court attempts to give such an instruction, it should be very careful not to omit any essential element of the crime. The question of deliberation and intention are wholly ignored in this instruction. It is quite evident that the Court used the word "concealed" as the synonym of "lying in wait." If the defendant concealed himself for the purpose of shooting the deceased unawares, then he was lying in wait, which is evidence of deliberation and intention. But a person might, while concealed, shoot another without committing the crime of murder, although there "were no words, demonstrations, or hostile acts at that immediate time made or committed by deceased." If the deceased had shot at the defendant less than an hour before, and had made threats against his life which had been communicated to him, it would not simply be a question whether the deceased was actually making a hostile demonstration at the time, but also whether the defendant, in good faith and without fault or carelessness, entertained the belief that the deceased was about to execute his threats. For if the defendant, without his fault or carelessness, did so believe, he would not be guilty of murder, though it turned out that he was mistaken. In other words, whenever a man exercises his right of self-defense, he must be understood to act on the facts as they appear to him. "And if, without fault or carelessness, he is misled concerning them, and defends himself correctly, according to what he supposes the facts to be, he is justifiable, though they are in truth otherwise, and he really has no occasion for the extreme measure." (Bish. on Cr. Law, 305.) The instruction was not sufficiently comprehensive upon this point. Neither is it correct as an abstract proposition of law.

We have not discussed any other error for which the judgment should be reversed. But the exception to the foregoing instruction was well taken.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed April 23, 1880.]

[No. 6641.]

THOS. POLLARD, RESPONDENT,

vs.

G. A. PUTNAM, APPELLANT.

STATE LANDS—APPLICATION TO PURCHASE. In a contest between applicants for the purchase of State lands, the purpose of the action provided for by the Political Code is not to annul the evidence of title, but to procure a determination of the question as to which applicant has the better right to purchase. So where a prior application was approved, and a certificate issued before the time allowed by law, the rights acquired by virtue of such prior application are not lost, though the approval and cetificate are void. The rights of an applicant cannot be affected by the malfeasance or misfeasance of any of the officers.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

J. W. Stump, for respondent.

H. T. Hazard, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

Section 3414 of the Political Code provides that when a contest arises before the Surveyor-General concerning a certificate of purchase or other evidence of title involving a question of law, he must make an order referring such contest to the District Court of the county in which the land is situated; and section 3415 of the same Code provides that, after such order is made, either party may bring an action in the District Court of the county in which the land in question is situated, to determine such conflict. In this case such a contest arose; and an action having been brought by plaintiff in the late District Court of the Seventeenth Judicial District, judgment was rendered in his favor on the 24th day of April, 1878. This appeal is taken from that judgment.

There is no conflict in the evidence, and the facts disclosed by the transcript are as follows: On the 30th of November, 1875, defendant made application in due form of law for the purchase of the land in controversy. On the 4th day of December, 1875, the Surveyor-General approved said application, and on the 18th of December of the same year a certificate of purchase was issued in favor of Putnam, the defendant. On July 30, 1877, the plaintiff filed with the Surveyor-General of the State his application to purchase the same land, his application being in due form of law. It further appears from the transcript that plaintiff entered upon the

tract of land in controversy, and took possession thereof, on the 19th day of June, 1859, under a deed from one J. P. Widney, and that there was not then, nor has there been since that time, any adverse occupation thereof.

It will be observed that the application of defendant was made on the 30th day of November, approved on the 4th of December, and the certificate of purchase issued on the 18th day of December. This was in violation of section 3498 of the Political Code, which reads as follows: "All applications filed in the Surveyor-General's office must be retained *sixty* days before approval."

In *Cunningham* vs. *Crowley*, 51 Cal. 128, the Court says: "The purpose of the action is not to annul the certificate of location or purchase, or other evidence of title; but if both of the parties are applicants for the purchase of the lands, the purpose is to procure a determination of the question as to which applicant has the better right to purchase them, * * * and the annulment of the certificate of purchase or other evidence of title is merely a consequence of the determination that the party holding it was not entitled as against the other party to effect a purchase of the lands." We are not informed of the grounds upon which the learned Judge of the District Court based his decision in favor of plaintiff; but the only point made in the brief of plaintiff and respondent is the invalididity of the approval and certificate of purchase, the approval having been made and the certificate having been issued in violation of section 3498 of the Political Code.

Conceding that the approval was made and the certificate was issued before the time allowed by law (and that they were void is not denied), would it follow therefrom as a conclusion of law that the rights of the defendant, acquired by virtue of his prior application, would be absolutely lost? The point made in respondant's brief is that "the defendant holds his certificate wrongfully, and cannot take advantage of his own wrong, and plaintiff had the right to proceed with his application, and it was within the power of the Court to give the better right to purchase to the plaintiff." In support of this proposition the Court is referred to the case already cited (*Cunningham* vs. *Crowley*, 51 Cal. 128). But that case fails to support the conclusion of the learned counsel for respondent. That case simply holds that the application was insufficient to warrant the issuing of a certificate. In the case now being considered there is no pretense that the application is not in all respects regular and sufficient, but it is simply claimed that the action of the Surveyor-Gen-

eral, in the premature approval of the application, was void. Did the illegal action on the part of the Surveyor-General render defendant's application null and void, and give precedence to a subsequent application? We are of opinion that it did not.

In the case of *Hinckley* vs. *Fowler*, 43 Cal. 63, the late Chief Justice, delivering the opinion of the Court, said: "The application of Fowler, thus made in accordance with law, gave him as against the State, so long as the statute remained in force, a privilege to purchase the land he applied for. As against the officers of the State and all applicants for the same land subsequent in point of time, it conferred upon him a *right* to purchase, which could only be lost by his own failure to pursue the further steps which the statute had prescribed. The malfeasance or misfeasance of any of the officers could not deprive him of the benefit of his application, nor operate to postpone him to the claim of a subsequent applicant."

The transcript does not show any failure on the part of the defendant to pursue further steps prescribed by the statute, whereby his prior claim arising out of the priority of his application was forfeited or lost to him; and the foregoing case establishes the principle that the rights of the applicant could not be affected by the malfeasance or misfeasance of any of the officers.

This is the only point made in the briefs; and if there is any other question involved in the case, counsel have failed to direct our attention to it.

Our conclusion is, that the rights of the defendant are prior and superior to those of the plaintiff, and that therefore he is entitled to judgment.

The judgment is reversed and the cause remanded, with instructions to the Court below to enter judgment in favor of the defendant.

We concur: McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed May 14, 1880.]

[No. 10,500.]

PEOPLE vs. COOPER.

From the Bench:

As there has been no appearance for defendant in this Court, and no points filed on his behalf, the judgment and order are affirmed.

DEPARTMENT NO. 1.

[Filed May 17, 1880.]
[No. 6970]

MAUD, RESPONDENT, vs. WEAR, APPELLANT.

JUDGMENT ROLL—WHAT CONSTITUTES PART OF. The summons with affidavit or proof of service, and the complaint with a memorandum endorsed thereon that the default of defendants for not answering was entered, constitute a part of the judgment roll; and any error in the entry of the default can be considered on the appeal from the judgment.

DEFAULT—APPEARANCE BY ATTORNEY. A default entered before the expiration of ten days is erroneous, notwithstanding notice of appearance was given by an attorney prior to the default.

Appeal from the Superior Court, Kern County.

V. A. Gregg and *R. E. Arick*, for respondent.

Geo. V. Smith and *Stetson & Houghton*, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

The judgment in this case must be reversed.

The summons was served on one of the defendants on the 7th, and on the other on the 8th, of October, 1879; and on the 11th day of the same month their default was entered. Neither of the defendants answered, and the summons with the affidavit or proof of service, and the complaint with a memorandum endorsed thereon that the default of the defendants in not answering was entered, constitute a part of the judgment roll; and the question whether there was error in the entry of the default of the defendants before the expiration of ten days after service of summons upon them, can be considered on the appeal from the judgment. The Court below seems to have laid some stress upon the fact of a notice of appearance for the defendants having been given by their attorney the day before the default was entered. The effect of that notice was not to shorten the time within which the defendants were allowed by law to answer. They were entitled to ten days after the service of the summons upon them within which to demur or answer, and it was error to enter their default before the expiration of that period of time. (*Burt* vs. *Scranton*, 1 Cal. 416; *Richetson* vs. *Compton*, 23 Cal. 638; *Gimmy* vs. *Doune*, 22 Cal. 635; *Pearce* vs. *Tully*, 8 Texas, 307.)

Judgment reversed and cause remanded, with directions to the Superior Court of Kern County to allow the defendants to demur or answer the complaint of the plaintiff within ten days after being notified that the remittitur herein has been filed in said Superior Court.

We concur; Thornton, J., Ross, J.

DEPARTMENT NO. 1.

[Filed May 14, 1880.]

[No. 10,501.]

PEOPLE, RESPONDENT, vs. GALLAGHER, APPELLANT.

DRAWING OF GRAND JURIES—NOTICE TO JUDGE AND SHERIFF. Under section 215 of the Code of Civil Procedure it is immaterial whether any notice of the drawing of the grand jury was given the Sheriff and Superior Judge, if those officers were in fact present.

IDEM—WHAT OFFICERS MUST BE PRESENT. A grand jury is regularly drawn when had in the presence of a *Superior Judge*, the Clerk, and the Sheriff.

Appeal from the Superior Court of ——— County.

W. H. Bullock and *W. B. Lardner*, District Attorney, for respondent.

John M. Fulweiler, for appellant.

From the Bench:

The defendant not having been held to answer before the grand jury, moved at the proper time that the indictment be set aside upon the grounds—

1. That notice of the drawing of the grand jury was not given as required by law.

2. That the drawing was not had in the presence of the officers designated by law, etc.

The motion was denied, and defendant excepted.

The drawing was regular. Verbal notice alone was given by the Clerk to the Superior Judge and Sheriff; but inasasmuch as the object of the provision requiring notice is only that those officers may be present, and as the case shows that both were in fact present when the drawing was had, it is entirely immaterial whether *any* notice was given them.

Section 215, C. C. P., requires that the Clerk shall notify the Sheriff and *County Judge*. It would seem that it was intended that the Superior Judge should succeed to the duty of the County Judge in respect to the drawing of jurors. (Court Schedule, section 2.) But even if there be doubt of this, the statute in respect to the mode of drawing is not "inconsistent" with the Constitution, except in the particular that there is no longer a County Judge. In other respects it continues in operation and effect by virtue of section 1 of the Schedule. It follows that the grand jurors were regularly drawn, the *Clerk* and *Sheriff* being present.

Judgment and order affirmed.

Legal Facetiæ.

SOMETHING LIKE A MISTAKE.– An old offender was recently introduced to a new county justice as John Simmons, *alias* Jones, *alias* Smith. "I'll try the two women first," said the justice; "bring in Alice Jones."

IN South Carolina a negro was on trial for burglary; but it was proved that he crawled into the mill through a hole in the wall, unfastened the door, set the flour out, fastened the door again, and crawled out through the same hole. The jury was instructed to acquit, as there was no breaking; so they brought in a verdict: "We find for defendant, but we believe he stole the flour."

IN Lynchburg, Virginia, a distinguished member of the bar, appealing to the Court for the discharge of his client, wound up with the statement that if the Court sent him on further trial, a stain would be left on his character which could not be washed off by all the waters of the blue ocean and all the soap which could be manufactured from the "ponderous carcass of the commonwealth's attorney." To this the ponderous attorney replied that, while he "deemed it foreign to the case at bar, he desired to advise the Court, if they thought it advisable to boil his body into soap, they should look to the opposite counsel for the concentrated lye out of which to make it."

INSTRUCTIONS TO A JURY.—The following is as lucid as many of the charges given to juries, and yet people wonder why so many cases are reversed on account of erroneous instructions.

"If the jury believe, from the evidence, that the plaintiff and defendant were partners in a grocery, and that the plaintiff bought out the defendant and gave his note for the interest, and the defendant paid for the note by delivering to plaintiff a cow which he warranted 'not breachy,' and the warranty was broken by reason of the breachiness of the cow, and the plaintiff drove the cow back and tendered her to the defendant, but the defendant refused to receive her, and the plaintiff took her home again, and put a heavy yoke or poke upon her to prevent her from jumping the fence, and the cow in attempting to jump the fence, by reason of the poke or yoke, broke her neck and died, and if the jury further believe that if the defendant's interest in the grocery was not worth anything, the plaintiff's note was worthless, and the cow good for nothing, either for milk or beef, or for 'green hide,' then the jury must find out for themselves how they will decide the case; for the Court, if she understands herself, and she thinks she does, don't know how such a cussed case should be decided."—*Chicago Legal News.*

Superior Court, County of Alameda.

[No. 202.]

J. W. CROWLEY vs. A. E. DAVIS.

W. W. Foote, J. C. Martin, and *Vrooman & Davis*, attorneys for plaintiff.

Greathouse & Blanding, attorneys for defendant.

A. M. CRANE, Judge:

The object of the complaint is to enjoin the alleged threatened construction of a steam railroad along Webster Street in the city of Oakland.

A restraining order has been granted with an order to show cause why the injunction prayed should not be granted. The answer of defendant to the complaint has been filed; and in connection with the pleadings, a stipulation admitting certain facts, signed by the attorneys of the respective parties, is on file herein.

The motion for an injunction upon the order to show cause why it should not issue has been orally argued and submitted, and the points and authorities of the parties have been filed herein.

The stipulation as to the facts provides:

"13. That the pleadings herein and the issues raised thereby shall be taken into consideration upon this motion, except where inconsistent with the facts herein stated; and when inconsistent with said facts so stated herein, then these facts shall prevail."

It becomes material, then, to determine from this stipulation and the pleadings—viz., the complaint and answer—what are the facts upon which this motion must be determined.

"The pleadings and the issues thereby raised" must be "taken into consideration." The only "consideration" which can be given to the pleadings is that which the law attaches to them. The law is that where the answer fully denies all the facts on which the equity of the bill is predicated, that the injunction cannot be granted, or if granted will be dissolved, unless the bill or complaint in these respects is sustained by affidavits.

The answer here does deny the facts stated in the complaint, in so far as such facts are material to the issuance of

the injunction; and hence we must hold that the facts so stated, for all the purposes of the motion, are not true, except in so far and to that extent as the stipulation admits the facts to be otherwise.

Guided then by these principles, and taking into "consideration" the pleadings and stipulation as to facts, the facts, and all the facts upon which this Court can act, are as follows, viz.:

That the city of Oakland is a municipal corporation duly incorporated under certain Acts of the Legislature of the State of California, among which Acts is a certain Act entitled "An Act supplemental to an Act entitled 'an Act to incorporate the city of Oakland, passed March 25, 1854,' and approved March 30, 1876."

That under and by said last named Act the City Council of the city of Oakland were empowered to grant franchises permitting steam railroads upon any of the streets of said city. But it was specially provided that the same should only be granted after two weeks' notice previously published in some newspaper published in said city of Oakland, and by ordinance passed by two-thirds of the members elected to said Council and approved by the Mayor, and upon a previous petition in writing of the owners of two-thirds of the front feet of the lands upon the street so used.

That heretofore—to-wit, on the 6th day of March, 1880—the said City Council *did duly pass* a certain ordinance granting to defendant, A. E. Davis, the right and franchise to lay down and construct a railroad in the city of Oakland upon and along Webster Street in said city, from the Webster Street Bridge to Fourteenth Street, with the right to operate engines and rolling stock by steam or other power; said track to be single or double, with the necessary turnouts and switches; and that on said day last named the Mayor of said city approved said ordinance.

That said Webster Street is a public street, and one of the principal streets of said city of Oakland, and has been opened and used as such for more than five years, and extends from the extreme southerly line of said city to Hawthorne Avenue, in all a distance of 11,000 feet and upwards, and, including both sides thereof, has a frontage of more than 17,000 feet of lands owned by plaintiff and others.

That the distance, exclusive of the share occupied by cross streets, from the northerly end of said bridge along Webster Street to the northerly line of Fourteenth Street is 2800 feet, and that the frontage of the lands on said Webster Street between said points is 5600 feet.

That said A. E. Davis presented to the City Council of the city of Oakland several petitions, which, in the aggregate, were signed by the owners of two-thirds of the front feet of the lands upon Webster Street between the southerly end thereof and the north line of said Fourteenth Street, but did not present any petition or petitions containing the signature of the owners of two-thirds of the lands fronting upon the entire length of Webster Street, in said city of Oakland, being 11,000 feet, as aforesaid. That the dedication of Webster Street was made by the then owners of the land by the filing of a map in the office of the County Recorder of Alameda County, and by the selling and conveyance of lots bounded by the streets shown on said map; and the public were allowed to use said street, and the city took charge of said street, and improved the same under the laws relating to the improvement of streets in said city.

That such owner never conveyed the fee of said street to said city, and that the said dedication and the filing of said map was made by the owner of the land covered by said street in the year 1854; and that at such time said person owned a large tract of land, which embraced said street, as well as the lot (of plaintiff) in the complaint described.

That plaintiff is the owner of a tract of land situated on the southeast corner of Twelfth and Webster streets, having a frontage of 100 feet upon Webster Street by a depth of 300 feet fronting on Twelfth Street, which tract of land was by the grants made from the original owner, through whom plaintiff deraigns his title, and is described in the deed under which he holds as being bounded "along the easterly line of Webster Street 100 feet."

That the laying down of said railroad tracks by the defendant, and the operation of a railroad along said street, would impede and obstruct the use thereof as a public street to the same extent as other steam railroads laid down and operated in any street of a city, and to that extent does impede the free access, ingress, and egress to and from plaintiff's property and across said street; and that his property will be damaged thereby to the same extent as property would be damaged on any other street by the construction and operating thereon of a steam railroad; and that said proposed railroad will cross the intersection of Twelfth and Webster streets, upon the south side of which Twelfth Street the land of plaintiff has a frontage of 300 feet, as shown by the official map of said city of Oakland.

That upon the presentation of said petitions to said Council, an ordinance was introduced, which was and is in the words and figures following:

[Here follows the ordinance in *haec verba*, which granted to Davis and his assigns the right, under certain restrictions, to lay down and construct a steam railroad from Webster Street Bridge to and across Fourteenth Street.]

(Section 4 was not in the original ordinance, but was added by way of amendment on the final passage, as hereinafter stated.)

That notice was given of such application of said Davis for said franchise, and of the introduction of said ordinance as required by law.

That thereafter, on the 6th day of March, 1880, when said ordinance so introduced was under consideration, the following proceedings were had, to-wit:

"The said ordinance was read the second and third times, and then Councilman Millan offered the following amendment, viz.: "An ordinance granting to Alfred E. Davis, his associates and assigns, the right to lay down and maintain a railroad upon Webster Street in the city of Oakland. The Council of the city of Oakland do ordain as follows: This ordinance shall take effect and be in force from and after its approval," which, on taking a vote by ayes and noes, was adopted—ayes, 6; noes, 1.

"Mr. Millan moved to reconsider the vote on amendment, which was lost—ayes, 1; noes, 6.

"An amendment offered by Councilman Cole was lost—ayes, 2; noes, 5.

"A further amendment offered was ruled out of order by the chair, and the ordinance as amended was passed—ayes, 5; noes, 2. But before the vote was announced one of the noes (Mr. Hughs) changed to aye, and gave notice that he would move to reconsider the vote at the next meeting.

"Councilman Millan moved to reconsider the vote upon the final passage of the ordinance, which was put and lost—ayes, none; noes, 7."

That at the time of the introduction, consideration, and passage of said ordinance, the standing rules of parliamentary practice were and are in the words and figures as follows, to-wit:

No copy of these rules is furnished, but it was alleged on the argument by plaintiff's counsel, and not denied, that a rule in force provided that upon the introduction of an ordinance it should be read a first time and then referred to a committee, upon whose report it should be read a second and third time before its passage. This rule was never suspended.

It further appears that the ordinance as introduced and

published was the same ordinance finally passed, with the amendment, however, added that it should take immediate effect, which was signed by the Mayor on March 6th; and the same as passed was immediately afterwards published by posting, and not in any newspaper by the said Council or its order, but the grantee of the franchise caused the ordinance as passed to be published in the Oakland *Daily Times* newspaper of March 17, 1880, as the same is hereinbefore set forth, and which ordinance, as amended and above set forth, was immediately copied into the proper record book of the City Council.

Notice of the ordinance was duly given, and it was published before being acted upon for the time and in the mode required by law—except, however, said section 4, giving it immediate effect.

That the petitioners for said franchise were, some of them, induced to sign said petition in consideration of money paid or agreed to be paid to them by defendant, and as much as $10 per front foot has been paid or promised to be paid to certain parties to sign said petition, and many of said signers have been paid or promised rewards for signing the same.

Upon these facts is plaintiff entitled to the injunction prayed for?

First. The plaintiff contends that because the defendant paid money to some, and agreed to pay money to the others, of the petitioners to procure their signatures that for this reason the petitions were a fraud in law, and contrary to public policy; and in support of this proposition the case of *Maguire* vs. *Smock*, 42 Ind. 1, is cited.

The case referred to does not sustain the position taken by plaintiff. The question of the validity of a city ordinance was not drawn in question in that case. It was sought to make certain improvements on a street, in order to accomplish which a certain proportion of the property owners must petition the Town authorities. The requisite petition was presented, and a resolution authorizing the work passed; and I gather from the case that the work was done. In order to procure the requisite number of names to the petition, certain parties made their obligations, agreeing to pay some of the signers of the petition a sum of money if they would sign the petition; and in an action upon this obligation it was held that it was void as against public policy; but, so far as appears, the resolution authorizing the work to be done was valid.

Many legislative Acts, as is well known, are obtained by

the direct use of money; and yet no instance can be shown where such an Act has, for that reason, been held void.

The Council of the city of Oakland were acting in a legislative capacity; and however much lobbying may have been done to secure their action, the ordinance finally passed was valid, and must be so held, at least against a collateral attack.

If the Council acquired jurisdiction to pass the ordinance, we cannot in this mode inquire into the influences which were brought to bear to aid in its accomplishment.

Second. And this leads to the inquiry as to whether the Council did obtain such jurisdiction.

It is alleged by plaintiff that because the owners of two-thirds of the front feet, on the whole street over two miles in length, did not petition, but only on that part of Webster Street proposed to be used, that therefore the Council never obtained jurisdiction to pass the ordinance. If this be the law, it would follow that the ordinance is invalid.

It is contended on the part of plaintiff that the *words* of the statute require the signatures of *two-thirds* in amount of the property owners fronting on the entire street, and not simply on that portion of the street proposed to be used, and that where the words of a statute are unambiguous that courts have no discretion, but must be governed by the legislative will thus declared; and in support of this proposition a large number of adjudged cases, to a greater or less extent sustaining it, are referred to.

There is no legal proposition better settled than that the legislative intention, when clearly expressed, must be obeyed; but that this intention is not inflexibly to be found and determined by the mere words or language used, is equally a rule of interpretation.

Indeed, the doctrine of literal construction and enforcement of statutes would so often lead to absurd results that the history of all written laws, from the earliest dawn of civilization, affords abundant instances of departure from the letter of the law, and adopting its spirit and intent.

Blackstone in his Commentaries gives an illustration of this in the statute which made the penalty death for drawing blood in the street. An unfortunate citizen fell in a faint, and a surgeon at once bled him in the street where he had fallen. Here was a clearly worded statute which made this benevolent but unfortunate surgeon guilty of a capital crime; and yet the courts held him innocent, because the act done did not come within the spirit and intent of the law.

The decisions are numerous in the English and American courts in support of this principle. Thus in *Jackson* vs. *Collins*, 3d Cowen, 89, which was an action of ejectment where the plaintiff's title depended upon a sheriff's deed, it appeared that the deputy sheriff who made the sale (one Lee) sold the property to Wadhams, another deputy sheriff; and it also further appeared that Wadhams, in purchasing the land, acted as trustee for Schofield, the real plaintiff in the ejectment suit, to whom he subsequently conveyed it.

At the time of this sheriff's sale (1822), a statute of the State of New York provided: "That it shall not be lawful for any sheriff or other officer to whom execution shall be directed, or any of their deputies or any person, for them or either of them to purchase any goods or chattels, lands or tenements, at any sale by virtue of any execution; and all purchases so made by them or any of them for the use of them or any of them shall be void."

Upon the construction of this statute the Court (Savage, C. J.) says:

"Admitting, as the plaintiff does, that Wadhams purchased for the use of Schofield, the purchase comes within the letter of the Act; but it never could have been the intention of the Legislature to have prevented a deputy sheriff, when plaintiff in an execution, from bidding in order to secure his money. The object was to prevent abuse; that the Sheriff and deputies should not be allowed to become purchasers at their own sales, and thereby be induced to conduct corruptly in relation to them. * * * Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction may seem contrary to the letter of the statute. (Bac. Ab. Tit. Stat. 1; 15 Johnson, 380.) A thing that is within the letter of a statute is not within the statute, unless within the intention of the makers. This proposition is fully established and illustrated by the cases cited on the part of plaintiff."

The cases cited by counsel in this case, and to which the Court refers with approbation, are *Reniger* vs. *Fagassa*, Plow. 18; *Strange* vs. *Croker*, *Id.* 88; 2 Inst. 64; *The King* vs. *Younger*, 5 T. R. 449; *Margate Pier Co.* vs. *Hanani*, 3 B. A. 266; *Edwards* vs. *Deck*, 4 *Id.* 212.

In the case of *The People etc.* vs. *The Utica Insurance Co.*, 15 J. R. 380, the Court (Thompson, C. J., afterwards Judge of the Supreme Court of the United States) lays down the law thus: "Such construction ought to be put upon a stat-

ute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances; and whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction may seem contrary to the letter of the statute," etc.

The reports of adjudged cases to the same effect might be cited from almost, if not quite, every State in the Union; but I have referred to these New York cases because the law as settled by the Supreme Court of that State, owing to the exceptional ability of its judges, especially in its earlier judicial history, have always been received as authoritative. These principles have been adopted and enunciated by our own Supreme Court in numerous decisions; and it may be affirmed that in no State has the doctrine of statutory construction, according to the *intent* and even against the *letter* of the statute, been more constantly affirmed.

In the case of *Ex parte Ellis on habeas corpus*, 11 Cal. 222, Ellis petitioned the Supreme Court for the writ, alleging that he was unlawfully held in custody by the Sheriff of El Dorado County, etc. The statute in force at that time provided that "the writ of *habeas corpus* may be granted by the Supreme Court, or any Judge thereof, or any District or County Court in term time, or by any Judge of any such Court at any time, whether in term or vacation;" and also provided for its issue and service without delay. Besides, the Constitution (Article I, section 5) made the writ one of right. And yet the Supreme Court, notwithstanding the plain letter of the statute, denied the writ on the ground that the petitioner should have applied either to the County Judge of El Dorado County or the District Judge of the District embracing that county, holding it an unreasonable construction that he could apply to any judicial officer or court from Siskiyou to San Diego. In the decision the Court (*inter alia*) says: "A familiar rule in the construction of statutes is to give effect to the meaning and intent of the law-maker. This may be gathered from the reason of the statute, the motives which led to the making of it, the object that was in contemplation at the time the Act was granted. (Smith Com. 634.) Puffendorfs says that which helps most in the discovery of the true meaning of the law is the reason of it, or the cause which moved the Legislature to enact it."

Again in *Knowles* vs. *Yates*, 31 Cal. 82, which was a con-

tested election case, the Court enunciates the principle that the reason and intention of the law-giver will control the strict letter of the law in interpreting the same, when to adhere to the strict letter would lead to palpable injustice, contradiction, or aburdity. The same rule was adhered to in *Calaveras County* vs. *Brockway*, 30 Cal. 325, and *The People* vs. *Turner*, 39 Cal. 370.

These instances of statutory construction, wherein the letter of the law has been disregarded where its spirit and intent were obviously contrary to the literal reading, might be multiplied almost indefinitely; some of the cases going to the extent of adding or injecting words which the statute did not contain, in order to ascertain the true meaning.

Section 1102, C. C. P., in respect to the writ of prohibition, provides:

"The writ of prohibition is the counterpart of the writ of mandate. It asserts the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, board, or corporation."

Here are plain words which authorize the writ in all cases of excess of jurisdiction, no matter of what nature, whether executive, legislative, or judicial; and the Supreme Court has held that only judicial acts can be prohibited, thus adding to the words of the statute the proviso that such extra-jurisdictional proceedings must be of a judicial character in order to justify the issuance of the writ. (*Maurer* vs. *Mitchell*, 53 Cal. 289.) Which construction was also again confirmed on appeal in the late case of *The People ex rel.* vs. *Board of Education of City of Oakland*, from this Court, in which it was again expressly held that, notwithstanding the words of the statute, the Act to be prohibited must be of a judicial nature.

I am aware that numerous decisions have been made by the Supreme Courts of other States, and perhaps some in this State, seemingly adhering to strict construction of the words and language of statutes, though absurd results should follow, even to the defeat of the object of the law; but these cases, when examined in detail, will, I think, be found to be governed by special circumstances, or a particular state of facts peculiar to themselves, and that they do not contravene the rule that the intention of the law is to be sought for and found, and when found is to govern, even as against the letter.

In the late case of *Fontaine* vs. *Southern Pacific Railroad Company*, filed April 28, 1880, in which the construction of

the statute under which it is sought to render the defendant liable is discussed, the Court says: "Every statute ought to be expounded, not according to the letter, but according to the meaning—*quia hæret in litera, hæret in costice.* (Dur. on Stat. 695.) And the intention is to govern, although such construction may not in all respects agree with the letter of the statute. (Plow. 205.) The reason and object of the statute are a clue to its meaning (Darwin on Stat. 695), and the spirit of the law and the intention of its makers are diligently to be sought after, and the letter must lend to these. (6 Bac. Abs. 386, 6 ed.; Kent's Com. 405; Smith's Commentaries on Statutes, sections 709–10.) The defendant in this case seeks to escape liability for the injury inflicted through the letter of this law."

Such is the latest authoritative utterance of our Supreme Court on this subject of statutory construction, and must be held as the settled law.

Recurring now to the statute under consideration, it requires that in order to give the City Council jurisdiction or power to act in passing the ordinance, that a petition should be presented to them, signed by two-thirds of the owners of the feet fronting on the street proposed to be taken. It is admitted that two-thirds of such owners on so much of the street as is proposed to be occupied by the road—that is, from the Webster Street Bridge to Fourteenth Street—have signed and presented such petition; but that Webster Street extends northerly about a mile and a quarter beyond Fourteenth Street, and that the owners of frontage on such extension, never having signed the petition, that therefore the requisite number of signatures have not been obtained—that is to say, that two-thirds of all the frontage of the whole length of Webster Street (about two miles) must have signed the petition, although the railroad was only intended to occupy less than three-fourths of a mile. I am of the opinion that such is not the meaning or fair construction of the statute.

The property owners beyond the line proposed to be taken will certainly suffer none of the annoyance arising from the construction and operation of the road; and all the complaint they could have would be the impediment it might present to travel, and this would only be that in common with all citizens residing on cross streets and other streets near the railroad; and hence no reason exists why they, any more than such other citizens, should sign the petition or give their consent.

"The street," in my judgment, means so much as is pro-

posed to be occupied, and does not include any more, or any portion beyond Fourteenth Street. The exact language of the statute is: "Upon the previous petition in writing of the owners of two-thirds of the front feet of the lands upon the street so used." So that upon a fair and reasonable construction of the very words of the statute, only the property owners upon so much of the street as is to be used for the railroad need sign the petition. The qualifications of petitioners are that they shall not only have frontage on that part of the street, but on the street taken. How can those not fronting on that part of the street not taken be said to front on the street taken, within the fair meaning of the statute, or even within its literal words? This is the spirit and meaning of the law, and in my judgment is also the fair reading of the letter; and I therefore hold that the City Council did acquire jurisdiction to proceed in enacting the ordinance.

Third. The jurisdiction seems to have been regularly followed by all the acts necessary as required by law, such as the publication of the proper notices, etc.; and I hold the ordinance to be legal and valid.

Its effect is to give the right of way, so far as the city of Oakland is concerned, for the construction and operation of the road.

Fourth. Nor do I think that any objection can be made that the ordinance was on the final passage amended by the addition of a section giving it immediate effect on the ground that this section was not a part of the ordinance as at first published, because, so far as it has been made to appear, this additional section has no consequence, inasmuch as the ordinance would without it have been in effect immediately on its passage.

The statute making State legislative Acts take effect sixty days after the passage does not apply to an ordinance like the one under consideration.

Fifth. Having thus reached the conclusion that the ordinance is valid, it remains to consider what rights it confers as against the plaintiff in this action, and what rights the plaintiff may assert as against the defendant.

The facts show that plaintiff owns a tract of land fronting 100 feet on Webster Street by 300 feet deep on Twelfth Street, the deed under which he holds bounding on the easterly line of Webster Street. This description, as a mat-

ter of law, limits the title of plaintiff to the line of the street, and does not give him any interest or property in the street itself. (The complaint also states that the lot of plaintiff is bounded by the west line of Webster Street.) Section 1112, Civil Code, it is true, provides that: "A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front to the center thereof, unless a different intent appears from the grant." But the grant under which plaintiff claims does not bound his land by the street, but, on the contrary, does bound it by the easterly line of the street; and hence, under all the authorities, as well as under the reading of this statute, his title is limited to that line, because, in the very words of the statute, "a different intent appears from the grant"—that is to say, an intent to limit its boundary to the easterly line of Webster Street. The Code makes no new law on the subject; it is simply a codification of an already existing law.

In New York it has been held that where the owner of land sells lots by reference to a map made by him, that the title of the grantee is limited to the lots, and does not extend to or embrace any part of the street in front thereof; and so the law has been held to be by our Supreme Court, in a decision made since the Code took effect (October, 1875), in the case of *Severn* vs. *The Central Pacific Railroad Company*, 51 Cal. 194, in which the lot in question was bounded by the easterly line of Sacramento Street; and in view of this description the Court says: "It is very clear, therefore, that the parties to the instrument intended that the lots should run up to the eastern line, and not to the middle of the street."

This adjudication is decisive of the question under consideration in the case at bar, in which the description is in all material respects the same as in that case; and I do not feel called upon to go into a labored elucidation of the law, and the citation of authorities, to sustain the law as laid by our Court of last resort, the decisions of which furnishes the rule by which we must be controlled.

Sixth. The case made by the plaintiff, then, is one where the railroad is proposed to be constructed along a street fronting his lot, to which street he has no title, but the fee of which is in another.

The law undoubtedly is, that the owner of the fee of the street in front of lots owned by him may demand damages

for the street taken for railroad purposes, and the consequential damages resulting therefrom.

Such is the law as it was held in *S. P. R. R. Co.* vs. *Reed et al.*, 41 Cal. 256; and no doubt could, by injunction, prevent the taking of the street for that purpose until a just compensation should be made. But, as we have seen, the plaintiff does not own any part of the street, and therefore does not come within the law of this case.

Seventh. It only remains to be considered whether the plaintiff can sustain his right to an injunction on the ground of consequential injury or damage to his property, arising from the construction and operation of the road along the street, which he does not own, in front of his lot.

It is evident that under the law as laid down in *Carson* vs. *Central Pacific Railroad Co.*, 35 Cal. 332, that this question must be answered in the negative.

In the case referred to, the action was for consequential damages alleged by plaintiff to his lot fronting on the street along which the railroad had been laid, and for abating the switch and turnout of the road as a nuisance. It was not shown, as pretended, that the plaintiff had title to any part of the land of the street. And the Court says: "That the plaintiff owned the land upon which the superstructure of which she complains was placed. She has not by her complaint pretended, nor was there any evidence produced tending to establish her title to the land to the center of the street; but, on the contrary, the facts agreed upon relating to the subject negative any such hypothesis. Hence the only conclusion to be reached upon this point is, that the plaintiff had no title to the soil of the street adjoining her lot; and consequently no case existed demanding compensation for the appropriation of it for the purposes of a railroad." (*Drake* vs. *Hudson River Railroad*, 7 Barber, 508; *Williams* vs. *New York C. R. R. Co.*, 16 New York, 101.)

And again, further on in the opinion, the Court says: "The mere consequential disadvantages of a street railroad to a particular locality cannot be the subject of a private action. Its proximity to a particular parcel or lot of land may affect the value of such property either to its advantage or disadvantage. But the company can claim no compensation for the enhanced value consequent upon the improvement; nor can the owner claim compensation for any depreciation which may result to the property because of the construction of the road in its vicinity. For such accidental disadvantages the party is without remedy. The consequential detriment to

the property in such case must be regarded as *damnum absque injuriâ*. We are of opinion that the evidence showed, beyond a reasonable question, that the company were authorized to lay down the switch, turnout, and side-track mentioned, and to use it for the purposes of a railroad enterprise. And we think the Court erred in deciding such turnout to be a private nuisance." (And the Court cites eight New York cases, one Illinois, and one Indiana case in support of its decision. See 35 Cal. 333.)

The Court further held in this case that the plaintiff could not give any evidence of special damage to her property in consequence of the construction of the turnout and side-track; and the judgment of the Court below, holding otherwise, was reversed.

In *Jarvis* vs. *Santa Clara Valley Railroad Co.*, 52 Cal. 438, the plaintiff sought an injunction; and plaintiff complained that a bridge, without a sufficient draw, had been erected across the stream or estuary leading to his warehouse, by which access thereto was cut off, and which would be a great and irreparable damage, and sought its abatement as a nuisance and an injunction; and the Court held that the obstruction complained of, if a nuisance, was one common to the public, and therefore not a private nuisance for which an action would lay.

Such, then, is the settled law of this State. The plaintiff not owning any property in the street, cannot prevent the appropriation of it, under the ordinance, for the purposes of a railroad; and having no other damage to complain of, except as hereinbefore stated—viz.: "That the laying down of said railroad track by the defendant, and the operation of a railroad along said street would impede and obstruct the use thereof as a public street, to the same extent as other steam railroads laid down and operated in any street of a city, and to that extent does impede the free access, ingress, and egress to and from plaintiff's property and across said street; and that his property will be damaged thereby to the same extent as property would be damaged in any other street by the construction and operation thereon of a steam railroad; and that said proposed railroad will cross the intersection of Twelfth and Webster streets, upon the south side of which Twelfth Street the land of plaintiff has a frontage of 300 feet"—shows only a damage or injury to him in common with all the other owners of property fronting on the street proposed to be taken, and hence states what would be a public nuisance (provided that the public had not, by the ordinance, given the right to do this), and hence no private action

can, within the authorities before quoted, be sustained therefor.

Eighth. But it is contended by plaintiff that the clause in our new Constitution providing that "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner," etc., establishes a new rule, and that any one suffering damage or injury to his property, although no part of his property may have been taken, and although the road, as in this case, may be entirely upon the land of another, or even upon defendant's own land, may sustain an action for the damages occasioned, and would consequently have the right to enjoin the construction of the road, even upon the defendant's own land, until such damages were ascertained and paid. This is the principle contended for by the plaintiff, and carried to its logical results would enable any owner of a landing or embarcadaro along the bay of San Francisco to come into Court, and upon the allegation that the construction of a railroad on land owned by defendant, along the general line of the bay shore, although not within a mile of the landing, would have the effect to cut off the freights which they had before been engaged in carrying, the produce of the country, owing to the completion of the road, and would thus render the embarcadaro property, consisting of warehouses, wharves, and vessels, of greatly less value, and would deprive its owner of large profits which theretofore had been enjoyed by him.

It would enable the owner of a stage line to say that by its construction along the general route of travel, his business would be broken up, and his private property invested in his business injured.

Many flourishing country towns, as is well known, have, as centers of business, been entirely prostrated, and the value of every man's property therein greatly depreciated—in some cases amounting to almost a total destruction of values by the construction of railroads which may not have passed within miles of the town.

In these cases, and others that might be instanced of a similar character, the property of the parties has certainly been depreciated, and to this extent they have been injured or damaged by the construction and operation of the road.

And yet no one would seriously pretend that the injured parties have suffered any such damage as the Constitution contemplates as a ground for legal redress. But why not, if the plaintiff can sustain this action? If it be said that

the threatened injury is in more immediate proximity to the plaintiff's property—viz., along the street in front of it—than in the cases supposed, yet that cannot be considered as an element in the discussion. The question is one of injury as well as damage, and it can be of no consequence whether the cause of the injury be near or far from the property depreciated. The effect in either case is the same. There are certain rights which all men in government organizations surrender for the public good; and among these, as elucidated in a vast number of adjudications of the various courts of the country, are such as grow consequently out of public improvements.

The law, with vigilance and care, protects the actual appropriation or injury to property taken for public use. This must be paid for. But mere inconvenience, or remote or even proximate resulting damages, in the construction of a railroad, are not the subject of an action unless the very property of the complaining party has been taken or injured.

Hence in Illinois, in the case of *C. B. & Q. R. R.* vs. *McGrines*, 79 Illinois, 272, where it appeared that the railroad had constructed a tressle work in front of the plaintiff's residence from six to nine feet high, the Court held that the plaintiff could recover no damages therefor; and elucidating the same principle quotations are abundant from the Courts of New York and other States, as may be seen by reference to the following authorities: *Patterson* vs. *Chicago & D. & V. R. R. Co.*, 75 Ill. 588; *The People* vs. *Kerr*, 27 N. Y. 188; *Kellinger* vs. *Forty-second Street R. R. Co.*, 50 N. Y., 206; *City of Clinton* vs. *C. R. & M. R. Co.*, 24 Iowa, 455; *Slatten* vs. *Des Moines Valley R. R. Co.*, 29 Iowa, 148; *Black* vs. *Philadelphia R. R. Co.*, 58 Penn. 249; 2 Dillon on Municipal Corporations, secs. 573, 579. Also: 32 Vt. 361; 28 Ohio State, 653; 34 Md. 479; 27 Wis. 199; 8 Dana, 288. And no injunction will lie to prevent the construction or operation of the road. (*New Albany & Salem R. R. Co.* vs. *O. Daily*, 12 Ind. 551; *Hodginson* vs. *L. I. R. R. Co.*, 4 Edw. Ch. 401; *Drake* vs. *Hudson River R. R. Co.*, 7 Barb. 508; *Barnes* vs. *South Side R. R. Co.*, 2 Ab. Pr. N. S. 515.)

To these cases I add the very recent decisions of our Supreme Court, made April 17, 1880. In the two cases of *Payne* vs. *McKenley*, and *Jewell* vs. *McKenley*, wherein an injunction was sought by property owners fronting on the street to prevent the construction of a steam railroad along Berry Street, in the city of San Francisco, and the Court held that because plaintiffs owned no part of the street, but only fronted on it, and because they showed no special

damage, or none not common to the public, and other owners of frontage, that an injunction would not lie. I think these cases are fully decisive of the case at bar.

The principle may be recognized as settled law, that neither a person nor a corporation can be held responsible, in the proper exercise of legal right, for any damage which may result to another therefrom.

Nor can any distinction be drawn between a street railroad and one propelled by steam. Both may, to a certain extent, be annoyances and hindrances to the full enjoyment of property differing only in degree; and in nearly all the cases above cited, where the principle has been involved, the roads were in fact operated or to be operated by steam. Such was the case in the two cases against McKinley above cited, decided only last month by our Supreme Court.

The case has so far been discussed upon the hypothesis that the plaintiff's right to the injunction depended, or might depend, upon the validity of the ordinance. But suppose there had no ordinance whatever passed, or suppose the ordinance to be invalid and confer no right, it would follow that even in such case the plaintiff, who owns no part of the street, could not, within the authorities before stated, sustain the right to an injunction for an injury common to all the owners of property fronting on the street, because the act to be prohibited would be a public nuisance, for the prevention or abatement of which a private action will not lie. (*Jarvis* vs. *S. P. C. R. R. Co.*, *supra*; *C. C. P. L. T. Co.* vs. *S. W. & W. R. R. Co.*, 41 Cal. 562; *Aram* vs. *Schelenberger*, 41 Cal. 449; *Payne* vs. *McKinley*, and *Jewell* vs. *McKinley*, *supra*.)

A patient and somewhat laborious examination of this case has therefore led me to the conclusions which may be summarized as follows:

1. That the City Council of Oakland obtained jurisdiction to enact the ordinance under which defendant claims, by the presentation to them of a petition signed by the owners of two-thirds of the feet fronting on the street proposed to be taken. That a fair and reasonable construction of the spirit and intent of the law, as well as a reasonable reading of its letter, does not require that any of the owners of the frontage on the street beyond the *termini* of the road, or beyond the point on the street "proposed to be taken," should sign the petition.

2. That all the proceedings of the Council after the presentation of the petition, and after jurisdiction has thereby been acquired, were regular, in accordance with law, and the ordinance cannot be impeached or invalidated, because the

Council in any step of its enactment may have suspended or disregarded its own by-laws. If any such objection were tenable, the question could not be raised collaterally, but only by a direct proceeding to impeach the ordinance.

3. Nor can the validity of the ordinance be drawn in question, because some of the signers to the petition may have received money as an inducement to sign the same. No legislative Act can be impeached on the ground of lobby or other influences which may be used to procure its passage.

4. That the ordinance confers the right upon defendant to construct and operate his road along the line of Webster Street indicated, so far as the public are concerned.

5. But so far as the owners of private property are concerned, whose ownership extends to and covers the fee simple of the street, or any part thereof, they can claim damages, which must first be paid before the road can be constructed upon the land of the street thus owned by them, and can enjoin the construction of the road until such damages are paid.

6. That a property owner whose land is bounded by the street has title to the centre of the street, unless the grant under which he holds shows a different intent; but when his grant bounds him upon the line of the street, it shows a different intent, and his title is limited to that line, and does not include any part of the street.

7. That as the complaint in this case states that the plaintiff's land is bounded west by the line of Webster Street, and the agreed statement of facts shows that the deed under which he holds is bounded easterly by the line of Webster Street, the title of plaintiff is limited to that line, and does not include any part of the street.

8. That the new Constitution has created no new element of injury or damage, and neither intends or means to make what was before a lawful act unlawful, and the subject of damages.

It follows that the motion for an injunction must be denied, and it is so ordered.

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Current Topics.

WE would call the special attention of our subscribers who are in arrears to the fact that the expense attending the publication of the JOURNAL has been largely increased during the year past, and therefore we are necessitated to urge upon them the importance of remitting the amounts due. It is a small matter, perhaps, to most of them, but of the largest importance to us who have the expenses to bear. We hope you will not lose sight of the fact that we have succeeded in establishing a law journal creditable to the Pacific Coast.

OUR next issue will contain several important decisions, among which will be the case of *Strauss* vs. *King*, decided in the United States Circuit Court for the Southern District of New York. The suit was brought on reissued letters patent for an improvement in pantaloons. The plaintiffs examined two hundred and eighty-three witnesses, and the defendants one hundred and forty-five. The plaintiffs' proofs covered 2465 pages, and the defendants' 1196. The plaintiffs' brief covered 323 printed pages, and the defendants' 152.

Supreme Court of California.

IN BANK.

[Filed May 27, 1880.]

[No. 10,515.]

EX PARTE DENIS KEARNEY ON HABEAS CORPUS.

POLICE COURT OF SAN FRANCISCO. The Police Court of the city and county of San Francisco is an "inferior court," to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of a defendant and over the subject matter.

MUNICIPAL BY-LAWS—VOID WHEN NOT REASONABLE. Municipal by-laws must harmonize with the general laws of the State, with the municipal charter, and with the principles of the common law. They must also be reasonable; and whenever they appear not to be, the courts will, as a matter of law, declare them void.

CONSTRUCTION OF LANGUAGE. Subdivision 3 of Section 28, Chapter III, of Order No. 697, as amended by Order 1196, passed by the Board of Supervisors of San Francisco, and which provides that "no person shall * * * address to another, or utter in the presence of another, any words, language, or expression having a tendency to create a breach of the peace," means only such words as have a tendency to create a breach of the peace on the part of the person addressed.

Petition for *habeas corpus*.

Clitus Barbour, for petitioner.

D. L. Smoot, District Attorney, *Delos Lake*, and *D. J. Murphy*, for the people.

McKINSTRY, J., delivered the opinion of the Court:

The Police Court of the city and county of San Francisco is an "inferior court" of limited jurisdiction, whose powers are conferred and whose duties and mode of procedure are prescribed by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of a defendant and over the subject matter. The remark to the contrary in *Ex parte Murray*, 43 Cal., is *dictum*. The only question there was, whether the judgment should have shown on its face the particular offense of which the petitioner had been found guilty. There is frequently a difficulty in ascertaining whether a particular court is or is not "inferior" within the meaning of that term as used in the books. In England probably all courts, except the King's at Westminster, the King's Bench, Court of Bankruptcy, Exchequer and Chancery, are treated as inferior courts. (Cowen and Hill's Notes, Phillips' Ev., 4th American ed., vol. 2, p. 105.)

It is clear that courts invested with a general common law

jurisdiction in law or equity are, when exercising their general jurisdiction, Superior Courts within the meaning of the rule which accords every presumption in favor of the validity of their judgments. In the United States, however, it has frequently been held that a court may be limited and subordinate in its jurisdiction, and yet not be an inferior court, "in the sense that it ought to certify everything precisely." (1 Saund. 74.) And this will explain some of the cases cited by counsel. In several of those cases it was in effect determined that a court holding jurisdiction of all criminal cases should be protected, though it adjudge a matter to be criminal which is not so, and proceed to punish it. (*Ex parte Tobias Watkins*, 3 Peters, 193; 5 Cranch, 173.) The Circuit Court of the United States for the District of Columbia having been determined to be a Superior Court, with jurisdiction over all crimes, the application of the rule was not difficult; and accordingly it was held, in *Ex parte Watkins*, that the judgment of that Court "was evidence of its own legality, requiring no inspection of the indictment on which it was founded;" and the Supreme Court refused to look at the indictment.

We do not forget that the only difference ordinarily recognized between superior and inferior courts is, that there is a *presumption* in favor of the validity of the judgments of the former, none in favor of those of the latter, and that a Superior Court may be shown *not* to have had power to render a particular judgment by reference to its record. We only say that in *Ex parte Watkins* the Supreme Court of the United States refused to look at the indictment, *because* the Circuit Court was to be treated as a Superior Court, *with jurisdiction of all crimes*.

In other cases it has been held broadly by the Supreme Court of the United States that the *District* as well as the Circuit Courts of the United States are *not* inferior courts. (Hurd on *Habeas Corpus*, 365.) It is apparent that decisions with reference to the conclusive presumptions arising from the judgments of those courts can have no influence upon the question whether the Police Court shall be conclusively presumed to have jurisdiction to render every judgment which it may render, unless the latter, like the former, is a "Superior" Court. In *Ex parte Murray*, 43 Cal., it was said: "The judgment is one thing—the brief statement (in the minutes) of the offense of which the prisoner has been convicted is a different thing. The former—the *ideo consideratum est*—need contain no recital; it is here simply 'that the said Patrick Murray pay a fine of $40,'" etc. Every reci-

tal in a *judgment*, therefore, as to the *offense*, is surplusage; and if the claim of counsel is well founded, the judgment of the Police Court, that a defendant be imprisoned, determines the power of the Police Court to imprison him. If, however, the Police Court is an *inferior* court (whatever the rule as to the Superior Courts), everything should appear in its proceedings necessary to give it jurisdiction and to justify its judgment. (*Kemps, lessee*, vs. *Kennedy*, 5 Cranch.)

There is no certain test by which to determine in all cases to which class (superior or inferior) any given court belongs. (Hurd on *Habeas Corpus*, 364.) It is not remarkable, therefore, that there has been some diversity in the application of the rule, as to presumptions, to particular courts. In New York the "Surrogate Court" is held to be "inferior;" but in Pennsylvania, Maryland, and Alabama the "Orphan's Court," and in Arkansas the "Probate Court," are held to be "superior." In New York the General Sessions of the Peace in the several counties are held to be "inferior;" while in Pennsylvania, Vermont, and Connecticut, a Justice's Court is under the rule said to be "superior." The question seems to have resolved itself into one of public policy, and whether the particular court of the limited jurisdiction ought to have extended to its judgment the sanctity of the presumptions arising from the adjudications of tribunals of general common law jurisdiction. That the underlying and controlling principle upon which the question must be decided is simply a consideration of correct public policy, is indicated by the language employed by the Supreme Court of Vermont in *Wright* vs. *Hazen*, 24 Vt. The Court there says: "We are aware that the decisions in New York, and probably in some other States, have required the Justice to know the facts limiting his jurisdiction at his peril. But no such rule has ever been applied to the courts of *general jurisdiction*, either in Westminster Hall or in this country; and the jurisdiction of justices of the peace has become so important and extensive that *we incline to believe sound policy requires* of us to extend the same rule of construction in favor of their jurisdiction which is done in favor of courts of general jurisdiction." (Hurd on *Habeas Corpus*, 366.)

This Court has never extended the rule as to presumptions in favor of the judgments of courts of general jurisdiction to courts of justices of the peace in California. On the contrary, such courts in this State have uniformly been treated as "inferior" courts, in favor of whose jurisdiction nothing could be assumed. (12 Cal. 283; 23 *Id.* 401; 23 *Id.* 318; 34 *Id.* 321.) And prior to the adoption of the amendments of

1862 to the Constitution of 1849, and the Act of April 20, 1863, the *Probate* Courts in California were always considered as of inferior and limited jurisdiction, to whose "records, orders, judgments, and decrees" were accorded none of the legal presumptions given to those of District Courts in the exercise of their more general jurisdiction. (*Pryor* vs. *Downey*, 50 Cal. 388.) So far, then, as analagous decisions of this Court have gone, it would seem that the Police Court should be treated as an inferior court. It would be strange if, while holding the judgments of justices of the peace in criminal cases not to carry with them the presumptions accorded the judgments of Superior Courts, we should determine that those of the Police Court exercising a jurisdiction, in so far as legislative enactments are concerned substantially the same, are to be treated as if rendered by a court of general jurisdiction. There are reasons peculiarly applicable to municipal courts which would render it proper that they should be held to be inferior courts. The primary design of municipal courts, so far as they act under city by-laws, is to prevent disorder in matters of local convenience, to regulate public and *quasi* public easements, etc. As was said by Campbell, J., in *Jackson* vs. *People*, 9 Mich.: "The Constitution, in apportioning the judicial power, as well as affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property, and other legal privileges, determined by the general tribunals of the State." There the judgment of the Recorder's Court, on a complaint for violating a city ordinance, was revised on *certiorari*. And it has been repeatedly held that this may be done even where by statute it is declared that the proceedings of a municipal tribunal "shall be final and conclusive," or "without appeal." (Dillon on Munic. Cor. 368.)

It is not necessary to say that *habeas corpus* may be resorted to whenever *certiorari* may be; but the jurisdiction employed by the Superior Courts by means of *certiorari* strongly indicates the jealousy entertained of possible excess of authority on the part of municipal tribunals administering by-laws or "prudential regulations" not extending beyond the limits of the municipality. The Constitution does not require the Legislature to provide for an appeal from the judgments of the Police Court to the Superior Court, and it would seem that every consideration of sound policy requires of us to treat the former court as an inferior tribunal, the record of whose proceedings should affirmatively establish its power to pronounce a particular judgment.

The Charter of San Francisco (Consolidation Act, Stat. 1861, p. 552) provides:

"SECTION 74. The Board of Supervisors shall have further power by order or regulation, * * *Eleventh*—To determine the fines, forfeitures, and penalties that shall be incurred for the breach of the regulations established by said Board of Supervisors, and also for a violation of the provisions of this Act when no penalty is affixed thereto or provided by law. But no penalty to be imposed shall exceed the amount or value of $1,000 or six months' imprisonment, or both." * * (Chap. 5.)

"The Board of Supervisors of the city and county of San Francisco shall have power by regulation or order, * * *Third*—To prohibit and suppress, or exclude from certain limits, all houses of ill-fame; * * to prohibit and suppress, or exclude from certain limits, or to regulate all occupations, * * exhibitions, and *practices* which are against good morals, contrary to public order and decency, or dangerous to the public safety." (Stat. 1863, sec. 1, sub. 3, p. 540.)

The Board of Supervisors passed Order No. 697, as amended by Order No. 1196. Chapter 3, section 1, of said order provides:

"Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and be punished by a fine of not exceeding $1,000, or imprisonment not to exceed six months, or by both such fine and imprisonment."

And section 28 of said Chapter III provides: * * "No person shall * * 2. Utter in the hearing of two or more persons any bawdy, lewd, obscene, or profane language, words, or epithets. 3. Address to another, or utter in the presence of another, any words, language, or expression having a tendency to create a breach of the peace."

We shall assume, for the purposes of this decision, without admitting the law so to be—First, that we ought not to inquire on *habeas corpus*, with a view to petitioner's discharge, whether the sections of the charter above cited authorized the Board of Supervisors to adopt the Orders 697 and 1196; second, that we ought not to inquire, except for a limited purpose, whether the ordinance is "reasonable," and one which a municipal government may enforce; third, that we cannot inquire on *habeas corpus* whether the Orders 697 and 1196 were properly *published* prior to their passage, inasmuch as they are verified by the signatures of the Mayor and clerk of the board.

It is not to be presumed that a court of general jurisdiction—or one which the law treats as such—has in any case proceeded to adjudge upon matters over which it had no authority. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction—an "inferior court"—but the recitals contained in the minutes of the proceedings must be sufficient to show that the case was one "which the law permitted the court to take cognizance of, and that the parties were subjected to its jurisdiction by proper process." (Cases cited in note 1, p. 407, Cooley's Const. Lim.) If indeed the proceedings show that an inferior court has found the existence or non-existence of a fact on which the right to proceed depends, and, by the constitution of the court, the existence of the fact is a matter placed within the jurisdiction of the court for determination, the adjudication of the inferior court that the facts exist is conclusive. As stated by Mr. Justice Cooley—after he has laid down the proposition that in case of a court of special and limited authority it is permitted to show a want of jurisdiction, even in opposition to the recitals contained in the record: "This we conceive to be the general rule, though there are apparent exceptions of those cases where the jurisdiction may be said to depend upon the existence of a certain state of facts which must be passed upon by the courts themselves, and in respect to which the decision of the Court, once rendered—if there was any evidence whatever on which to base it—must be held final and conclusive in all collateral inquiries, notwithstanding it may have erred in its conclusions." (Con. Lim. 407.)

We have assumed that the existence of the ordinances which, as claimed, gave the Police Court the appropriate jurisdiction, and the publication thereof—supposing the publication to be inquirable into by any court—were matters to be ascertained by the Police Court, and that on *habeas corpus* we ought not to go behind the finding of the Police Court with respect to such matters. We also assume that the orders or ordinances referred to *were* proven. We are not called on, therefore, to re-examine the evidence with respect to any fact passed upon by the Police Court.

The records of that Court show that two complaints were made against the petitioner. The first charged him with having uttered, in the hearing of others, bawdy, obscene, and profane language. *That charge was dismissed.*

As we have seen, nothing is to be presumed, in the first instance, in favor of the judgment of the Police Court. "If the record does not show upon its face the facts necessary to

give the court jurisdiction, they will be presumed not to have existed. But this presumption (except in California as to such jurisdictional matters as the law requires to be reduced to writing) may be rebutted, and the jurisdictional facts established by extrinsic evidence." (Hurd on *Habeas Corpus*, 367.) We have assumed that the fact of the existence of the ordinances which, as was supposed, gave the Police Court jurisdiction, must be presumed to have been established to the satisfaction of that Court; and for the purposes of this case the presumption will be held to be conclusive. But the Police Court could not give itself jurisdiction by its *construction* of an ordinance, when the very question is whether the inferior tribunal was given power by the ordinance to try petitioner on the charge on which he was actually tried. It devolved, therefore, upon those whose function it was to sustain the jurisdiction to produce the ordinances which *were proved* in the Police Court, in order that it could be ascertained whether they made the act for which petitioner was tried a crime, for the punishment of which the inferior court had power to impose the judgment which was rendered. We take judicial notice that the act charged in the complaint constitutes no crime under the general laws of the State. If the judgment of the Police Court is supposed to derive its validity from a city ordinance, we may assume an ordinance to have been proven; and it would be enough to show, perhaps, that it was admitted as proven by the Police Court. But whether the ordinance gave the Police Court *power* to punish petitioner for the offense charged in the complaint, is a question of law which we cannot avoid the responsibility of determining. Can it be doubted that if, on proof of an ordinance prohibiting certain unlawful assemblies, the Police Court should proceed to try a defendant charged with doing some act not prohibited, and to render a judgment imposing the penalty prescribed for taking part in such unlawful assemblies, the judgment would be *void?* The complaint would charge no crime known to the *law of the land*, and the same rule must apply whether the law conferring jurisdiction on the inferior tribunal is to be looked for in the statutes of the State, or in orders of the Board of Supervisors of San Francisco.

Inasmuch as no presumptions are to be indulged in favor of the judgments of inferior courts, and as this Court will take judicial notice that the facts set forth in the complaint constitute no crime under the general laws of the State, the record of the proceedings in the Police Court should manifest that the petitioner was there prosecuted for an alleged

violation of some city ordinance. Either the complaint sufficiently refers to, and so makes part of itself, Orders 697 and 1196, or it does not. If it does not, there is nothing in the proceedings of the Police Court which show that the petitioner was tried for any offense of which that Court has jurisdiction. We shall assume, however (as against petitioner), that Orders 697 and 1196 sufficiently appear from the record; and further, because alleged in the complaint in the Police Court, that they are now properly before us.

As we have seen already, the charge of uttering obscene and profane language was *dismissed*. It only remains to inquire whether the other complaint charged the crime created by the third subdivision of section 28 of Chapter III of Order 1196; since, if it did not charge that crime, it is plain it charged none within the jurisdiction of the Police Court.

The subdivision declares that no person shall "address to another, or utter in the presence of another, *any* words, language, or expressions *having a tendency* to create a breach of the peace." We shall not inquire, *in this place*, how far it accords with constitutional law, or the policy of our general legislation, to place the power in the hands of a judge or jury to decide that "any words"—to others, perhaps, apparently innocent—which they may think objectionable *have a tendency* to create a breach of the peace. That the language charged in the particular instance now before us was not only indecorous, but in the highest degree indecent, cannot affect the question. The next conviction may be for the use of words less offensive, and the attempted definition of the crime sought to be created by the ordinance is so uncertain as would leave it to the varied judgments or tastes of successive juries to find defendants guilty or not guilty of a crime for the use of exactly the same language. It may be that the Legislature might declare *slander* to be a crime, or might authorize a municipal board so to declare. If this were done, however, it can hardly be doubted that the constitutional provisions in respect to *libel* would apply. The question whether the words spoken were slanderous would be a question for the jury, and the defendant would be allowed to prove, if he could, that the words spoken were *true*, and that they were spoken for justifiable ends. The provision of the ordinance on which (as is claimed) petitioner was convicted, does not require that words shall be *slanderous*, and does not permit the defendant to prove either the truth or justifiable intent. Libel is distinguished from slander in that it is supposed to be more deliberate. The "freedom of the press" is surrounded by many constitutional safeguards.

Can a Legislature—*a fortiori*, a City Council—sweep all these aside by a simple process of calling libel by another name? The Legislature *cannot* deprive the publisher of a newspaper of his right to prove the truth of a statement alleged to be libelous, and that it was published for justifiable ends. Will it be contended that the printer may be deprived of this great constitutional right by providing that he shall be punished not for *libel*, but for the publication *of words having a tendency to produce a breach of the peace?*

The foregoing will suggest some of the evil consequences which might ensue were we to give the construction contended for by counsel to the third subdivision of section 28 of the chapter, and hold that it covers the case of one who may have used words having a tendency to excite the wrath—in case he should ever hear of them—of a person of whom the words were spoken, although such person may not have been present when the words were spoken, nor may ever have heard them recited. We cannot too often repeat that the alleged circumstances of this particular case should not be appealed to as requiring of the courts to attribute a forced meaning to the ordinance. It may be admitted, for the purpose of this argument, that the language alleged to have been employed by the petitioner conveyed a vile and perfectly unwarrantable assault upon the character of an honorable man. But it is only when an offense particularly aggravated against morals or justice has been committed that a temptation arises to *distort the law*—to expand the meaning of words beyond their plain purport—to give to a penal statute an effect not intended by those who framed it, nor required by its language—that we may bring within its scope, and subject to condign punishment, those whom we believe deserve the severest penalties. At such times, if ever, we forget that the worst as well as the best of men is entitled to the protection of the Constitution, and that a strained interpretation of the law which deprives a bad man of his right to personal liberty to-day, may to-morrow deprive a good man of his equally sacred—in the eyes of some of us, perhaps, *more* sacred—rights to property.

To constitute the offense, the words must either be addressed to, or spoken in the presence of, the person whom they have a tendency to incite to a breach of the peace; or, on the other hand, they are punishable if spoken anywhere, or addressed to any third person. Even if the language of the ordinance were ambiguous, we would be compelled to reject an interpretation which would sustain the latter view. To hold that the conversation of intimate friends may be re-

ported, or the privacy of domestic circles invaded, to secure evidence of declarations which, if subsequently communicated to the person to whom they relate, may, in the opinion of a jury in the Police Court, "have a tendency" to induce him to commit a breach of the peace, would recognize and encourage a system of *espionage* abhorrent to American ideas, and productive of more evil than the practice condemned. Such evidence necessarily would be of the dubious character of which Mr. Greenleaf speaks in his treatise on Evidence. All that he says of oral admissions is applicable to the repetition of what one may "utter to or in the presence of another," especially in the absence of the person spoken of. "With respect to all verbal admissions, it may be observed that they ought to be received with great caution. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either * * * not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say." (1 Greenleaf's Ev., sec. 200.)

Such an interpretation of the orders would revive a kind of judicial investigation for which there have been no precedents in this country, and none in England since the reign of Edward the Fourth, when a citizen of London was hanged who had said he would make his son an heir of the "crown" (the sign of the house in which he lived); and a gentleman, whose favorite buck the King had killed in hunting, was decapitated because he had wished it, horns and all, "in his belly that counseled the King to it." (1 Hale's P. C. 115.) To say that a prosecution, such as has been mentioned, may be maintained by virtue of an ordinance, the sole authority to pass which is found in the city charter above cited, by which the Supervisors are empowered to "regulate all occupations, * * * exhibitions, and *practices* which are against good morals, contrary to public order, or dangerous to the public safety," is to declare a doctrine which, if not subversive of constitutional principles, is apparently violative of established rules relating to municipal legislation.

Municipal by-laws must harmonize with the general laws of the State, with the municipal charter, and with the principles of the common law. (14 Barb. 478; 4 Hill, 209.) They must also be *reasonable*; and whenver they appear not to be, the courts will, *as matter of law*, declare them *void*. (2 Kyd on Corp. 107.) We have no space to amplify the

suggestion, but there is at least grave doubt whether an ordinance which provides a punishment of six months' imprisonment and $1,000 fine as the penalty for incautious words spoken of an absent person at the breakfast table (which may arbitrarily be considered by a jury as having a tendency to create a breach of the peace), would be "reasonable," or held to be authorized under a general grant of power to the Supervisors to prohibit or regulate practices "against good morals, or contrary to public order, or dangerous to the public peace." That such an ordinance would not accord with our governing policy is further evidenced, perhaps, by the circumstances that no like prohibitory legislation has ever been attempted in this or other States.

We have assumed, for the purposes of this decision (although the contrary course, the precise objection not being made, has been repeatedly pursued by the Court, as also in the United States Courts—notably in Parrott's and other recent cases), that the *invalidity* of the Orders 697 and 1196 ought not to be determined in this proceeding, and made the ground of petitioner's discharge. We have assumed—for the purposes of this decision only—that here on *habeas corpus* the Police Court will be presumed to have adjudged the order *valid*, and that its judgment in that regard is to be treated as final. But in ascertaining the *meaning* of the portion of the Order 1196, on which the judgment against the petitioner is based, we may very properly consider the circumstance that if the language, supposing it to be ambiguous, be construed in one way, it does not necessarily conflict with the municipal charter or with the common or statutory law; while, if it be construed in another manner, it is either clearly repugnant to all these, or leaves the judicial mind with grave doubts that it contravenes State legislation, or impinges upon the due enjoyment of constitutional and legal rights. It is the ordinance *properly construed* which the Police Court has adjudged to be valid.

We have so far considered subdivision 3 of section 28 as if its language would admit of two interpretations. But we are unable to discover any ambiguity in it. It declares: "No person shall address to another, or utter in the presence of another, any words * * having a tendency to create a breach of the peace." If the second clause of the sentence had been omitted, and the subdivision had read, "address to another any words * * having a tendency," etc., could any body have doubted what it was intended to prohibit? There could have been no hesitation in declaring that the words must be such as have a tendency to produce a breach

of the peace on the part of the person to whom they are addressed. There is nothing in the language "or utter in the presence of another" which can enlarge the scope of the intended prohibition. "No person shall address to or utter in the presence of another person words having a tendency to induce such other person to commit a breach of the peace." Is not this a simple paraphrase of the language of the ordinance? Either this truly represents the meaning, or, as we have seen, the subdivision prohibits the utterance of words—which can be construed as having a certain tendency—in private, or to the smallest audience, and in the absence of the only person who would have reason to be offended by them—a construction which might be supposed grievously to interfere with the inalienable privileges of coteries. It is certain that the ordinance does not require that more than two persons shall be present when the words are spoken. If it had been intended to punish the denunciation of absent individuals at public assemblages, it would seem that language would have been employed somewhat like that of the Act of January 19, 1878 (which was repealed at the next session of the Legislature): "Any person who, in the presence of twenty-five or more persons, shall utter any language with *intent to incite* * * * to any acts of violence," etc. Certainly, if the purpose had been to prevent appeals to a riotous mob, such as were calculated not only to incite those present to violence, but also to lead to breaches of the peace on the part of an absent person denounced, it would not have been difficult to find apt and fitting words to express that purpose. For actual riotous conduct the remedy is the strong arm of the Government efficiently wielded, as we have no doubt it will be if the occasion arises, by the Executive power. But the purpose of the third subdivision of section 28 of Order 1196 is less comprehensive, and seems very apparent. The law has always given weight to the *provocation* which leads to an assault. Insulting words and conduct in the presence of the assailant may sometimes reduce the degree of his crime, and may always be considered in *mitigation* of punishment.

The portion of the ordinance so often referred to provides a penalty for him who shall provoke an assault upon himself, "by addressing to another person, or uttering in the presence of another person, words * * * having a tendency to create a breach of the peace."

The judgment of the Police Court, separated from the extraneous recitals which constitute no part of it, is simply: "It is ordered and adjudged that * * Denis Kearney

pay a fine of $1,000, and be imprisoned in the House of Correction of the city and county for six months." Does the record of the proceedings of the Police Court show that the Court had jurisdiction to render this judgment? The case is unembarrassed by another question, since no oral evidence was offered to establish that he was in fact tried and convicted for the commission of any act other than that charged in the complaint, nor is there any entry in the minutes of the proceedings in any degree looking toward a prosecution for the commission of any other act. The complaint charges that at a certain date, in San Francisco, the petitioner "did willfully and unlawfully utter and address to others—to-wit, to a large number of persons then and there assembled, to-wit, 100 and more persons, whose names are unknown to deponent—certain profane words and language, which words and language then and there had a tendency to create a breach of the peace." Then follows a recital of the words alleged to have been spoken. There is here no averment that the words were "addressed to, or uttered in the presence of," the person of whom they were spoken. But that the words are addressed to, or uttered in the presence of, the person with respect to whom they are spoken, constitutes, as we have seen, the very *gist* of the offense created by the third subdivision of section 28 of Chapter III of the city charter. Unless we adopt the construction of the language of subdivision 3, which we have already rejected, however reprehensible the alleged action of petitioner, he did not commit the particular crime there defined, though he uttered the words in the presence of any number of persons other than him of whom he spoke. This is not the case of a complaint inartificially drawn, which intimates the existence of the facts necessary to the constitution of the offense, or even of an attempted statement, insufficient, but indicating a purpose to declare on the essential facts.

It is a total failure to allege any cause of action, and, however objectionable the conduct imputed to the petitioner, he is no more in the eye of the law charged by the complaint with any crime than if the paper had ascribed to him the most innocent of deeds. If Denis Kearney was legally convicted under the ordinance by reason of his denunciation of a person in his absence, *then each one of those who have employed similar (though sometimes less profane) language* in respect *to* Denis Kearney, *he* not being present, may be *imprisoned and fined by the Police Court.*

It would seem that criminal actions in the Police Court must be commenced by complaint in writing (Penal Code,

1426), and that the Court is required to keep a docket, in which must be entered each action and the proceedings therein. (Penal Code, 1428.) As to the jurisdictional facts which the law directs to be set forth on the records of that Court, they must be apparent on the face of the proceedings, or its judgment is void. (*Jolly* vs. *Foltz*, 34 Cal. 321.) If, however, it should even be admitted that it might be established by proof *aliunde* that the petitioner was tried and convicted of an offense of which the inferior court had jurisdiction, no evidence of any kind to establish that fact has been produced.

Inasmuch as it affirmatively appears from the record of the proceedings that the petitioner was tried and sentenced to be punished for the commission of an act which is, and under the existing law can be, *no crime*, the judgment of the Police Court is absolutely void. The petitioner must therefore be discharged from custody.

It is so ordered.

We concur: McKee, J., Sharpstein, J., Ross, J.

CONCURRING OPINION.

I concur in the reasoning and the result reached in the opinion signed by my brethren, McKinstry and others. In doing so, I desire to add that I do not wish to be considered as concluded by anything contained in that opinion as to a judgment or sentence of any court of criminal jurisdiction known to the Constitution and laws of this State. I am strongly inclined to the opinion that the same result must be reached upon a so-called judgment of any of the Superior Courts, when there is nothing in the shape of law to maintain the judgment. It must be remembered that we have no criminal *common law*. All our public offenses or crimes are *statutory*. Unless a statute exists making an act a crime or a public offense (see Penal Code, section 6), no one can be adjudged to suffer punishment for the commission of it, however heinous it may be when tested according to the ordinary criterion of public duty or private obligation. To hold that any court of criminal jurisdiction can adjudge an act, not a public offense by statute, deserving of punishment and sentence, and commit to prison or fine for the commission of such an act, which in such a condition of the law is innocent, and that the person so sentenced could not be relieved from it on *habeas corpus*, would be, it seems to me, to hold that the Court is invested not only with judicial but with legislative power—that the Court can make the law, create the offense, and adjudge a person guilty of having committed it. The

Court in such a case would have no jurisdiction. As was said by the learned Judge who wrote the opinion in Corryell's case (22 Cal. 181): "The Court derives its jurisdiction from the law, and its jurisdiction extends to such matters as the law declares to be criminal, and none other; and when it undertakes to imprison for an offense to which no criminality is attached, it is beyond its jurisdiction." Such cases, it is evident, must be of rare occurrence. They are the offspring of peculiar circumstances which happen infrequently. When they do occur, and are presented for adjudication, should not the Court be as ready in such emergencies to relieve on *habeas corpus* as to enforce the legal punishment in case of guilt? (See *People* vs. *Liscomb*, 60 N. Y. 569, 570.) I fail to see that any serious consequences can flow from such a use of the writ of *habeas corpus*, unless an injury can result from the enlargement of an innocent person, whom some court has, by grievous mistake and illegal sentence, adjudged to suffer confinement in prison.

However, the question is not before us for decision; and these few observations are intended to preclude a conclusion which might possibly be drawn from the opinion of the Court, and to state the point without deciding it.

THORNTON, J.

I find myself unable to concur in the conclusions reached by my associates. MYRICK, J.

I dissent. MORRISON, C. J.

IN BANK.

[Filed April 26, 1880.]

[No. 6456.]

LANGLEY vs. VOLL.

WRIT OF ASSISTANCE—STRANGER TO RECORD. (See full report of this case on page 271, Vol. 5, No. 10.)

By the Court:

As the last point discussed in the opinion filed is decisive of the appeal in this case, it is unnecessary to determine whether a stranger to the record is entitled to a writ of assistance. In that respect the opinion may be modified; and we now modify our language so as to leave the point open for further consideration.

Petition for hearing in bank denied.

DEPARTMENT NO. 2.

[Filed May 26, 1880.]

[No. 6564.]

GEORGE R. BUTLER, RESPONDENT,

vs.

WILSON BEACH, APPELLANT.

PARTNERSHIP ACCOUNTING—INTRODUCTION OF ALTERED BOOKS. Where the plaintiff in an action for a copartnership accounting had altered the books of the firm after the dissolution, he will not be permitted to introduce them to support his case unless there is other evidence offered to show that the alterations were properly and correctly made.

CONFLICT OF EVIDENCE. Where there is a substantial conflict of evidence, the judgment will not be disturbed on appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—WHEN SEPARATELY STATED. When the facts found are distinctly stated in several subdivisions, followed by "and as a matter of law resulting from the foregoing findings of fact, I do further find that the plaintiff is entitled to recover," etc., the findings of fact and conclusions of law are sufficiently and separately stated.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Thom & Ross, for appellant.

H. T. Hazard, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

On the 4th day of December, 1873, written articles of copartnership were entered into between plaintiff and defendant for the purpose of carrying on the business of "livery stable keepers, farmers, and stock raisers;" and such copartnership continued in existence until the first day of May, 1876, when the same was dissolved by mutual consent. Disagreements having arisen in respect to the settlement of the accounts of the firm, plaintiff filed his complaint on the 8th day of March, 1877, praying that an account be taken of the dealings and transactions of the late firm. The case was referred to George C. Gibbs, the Court Commissioner, to take testimony and report findings; and on the fifth day of December, 1877, Gibbs filed his report, from which it appears that there was due from the defendant to the plaintiff the sum of $4,510.75, and upon this report judgment was entered on the same day. Defendant made his motion for a new trial, which was denied; and the appeal is taken from the judgment as well as from the order of the Court denying the motion for a new trial.

The first point made on the appeal is that error was committed in allowing plaintiff to introduce in evidence "Exhibit A." This exhibit purports to be a correct statement

of the accounts between plaintiff and defendant, and was prepared by the witness Winslow, an expert in book-keeping. On cross-examination, Winslow admitted in substance that he did not know that the books and papers from which "Exhibit A" was made up were correct, and he further stated that the books had been changed by him at the instance of the plaintiff after the dissolution of the partnership.

If this had been the only evidence to justify the admission of the exhibit, it would have been error for the Court Commissioner to have admitted the same; for it cannot be doubted that the plaintiff had no right to alter the books after the dissolution of the partnership, and then offer in evidence such altered books in support of his case. But there is other evidence establishing the correction of the books and papers from which the statement was prepared, and this, taken in connection with the evidence of Winslow, makes the statement preferred by him competent evidence in the case.

The witness Winslow says: "I obtained these items which I have placed in the books from the notes and papers that Mr. Butler holds, and the papers from which said additional entries are made are here tendered in evidence." And speaking in this connection the plaintiff says: "I think it is a correct statement of the account. It is to the best of my knowledge. It was made by Mr. Winslow and myself. We looked over the books and got up the statement the best we could. I am not an expert. I think the items stated in the account are correct." The books were then offered, so that any item which the defendant wanted to examine could be turned to. The witness Winslow then testified as follows: "My occupation is a book-keeper. This statement was obtained from Mr. Butler's books and accounts and papers, kept by him for the firm of Beach & Butler." Butler says: "All the accounts he (Winslow) has put into the books since we sold out, I have vouchers to show for them, notes and everything of the kind. I have vouchers to show for everything I have given myself credit for in that account." And further on he continues: "Perhaps both of us might have failed to keep correct accounts of the partnership, but I think I kept a correct account, or meant to. I have a record of all moneys paid to me, I think, and of all transactions; and these books contain a correct statement, and are the records I have kept."

This is a portion of the evidence given on behalf of the plaintiff, and was sufficient, in our opinion, to sustain the findings of the Court Commissioner and the judgment en-

tered thereon. It is true that there was a substantial conflict in the evidence, but the rule in such cases is that the Appellate Court will not disturb the judgment of the Court below.

In the next place, it is claimed by appellant that the Commissioner failed to settle the profit and loss account of the copartnership. In answer to this objection, it may be stated that it appears from the eighth finding that there was a full settlement and adjustment of the firm. The eighth finding is as follows: "That the amount appearing to be due the plaintiff from the defendant of and from an adjustment of all their partnership accounts and transactions, as by the foregoing statement, is the sum of $4,510.75 in gold coin of the United States."

It is also claimed on this appeal that the findings of fact and the conclusions of law are not separately stated. The facts found are distinctly stated under several subdivisions, commencing with 1 and ending with No. 8, and then comes the following:

"And as a matter of law resulting from the foregoing findings of fact, I do further find that the plaintiff is entitled to have and recover of the defendant the sum of $4,510.75." In our opinion that was sufficient.

Other points made by appellant are not well taken; and no error appearing in the proceedings below, the judgment and order are affirmed.

We concur: Thornton, J., Myrick, J.

DEPARTMENT NO. 2.

[Filed May 20, 1880.]

[No. 7161.]

CLARK, PETITIONER,

VS.

THE SUPERIOR JUDGE OF LASSEN COUNTY.

PROHIBITION. It is not the office of the writ of prohibition to annul orders or judgments of courts.

IDEM. If, after acquiring jurisdiction of the parties and subject matter of the action, a Superior Court should order judgment in favor of one of the parties without a trial, that judgment would neither be "without or in excess of the jurisdiction of such tribunal," although it might be erroneous; and should said Court proceed to try a cause *de novo*, instead of adopting the findings, conclusions, and judgment of a late District Court, from which Court the Constitution had transferred the cause, the only remedy for such error is an appeal.

Petition for writ of prohibition.

Geo. Caluvalader, for petitioner.

E. V. Spencer, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an application for a writ of prohibition. The grounds upon which the application is based are substantially the following:

Prior to the commencement of the year 1880, one Adam Murdock sued the petitioner herein in the District Court of the Twenty-first Judicial District of this State, in and for the county of Lassen. Issues were joined in said action, and a trial was had in the month of November, 1879, before the Court sitting without a jury. The Court took the case under advisement, and on the 24th of November, 1879, adjourned *sine die*. On the 26th day of December, 1879, the Judge of said Court made and signed written findings and a judgment (in the form of a decree) in favor of the plaintiff in said action, and forwarded said findings and judgment to the clerk of said Court, with private directions not to file said judgment until the reporter's fees were paid. The clerk received said findings, judgment, and directions on the 30th day of December, 1879, and they remained in his office without being formally filed until after the new Constitution went into effect. Since then the reporter's fees have been paid, and on the 13th day of April, 1880, the Superior Court of said Lassen County ordered the clerk of said Court "to place said judgment and findings and conclusions of law upon the files and records" of said Court. The prayer of the petitioner is "that a writ of prohibition issue annulling the said order" of said Superior Court.

Strictly speaking, it is not the office of the writ of prohibition to annul orders or judgments of courts. But it is sufficiently plain to our comprehension that the case presented is not one in which a writ of prohibition can properly issue. Whatever else may be doubted, there is no room for any doubt as to the fact that the action was one of which the Superior Court had jurisdiction, and could proceed to try and determine it precisely as it might have done if said action had been originally commenced in that Court. The case was transferred to that Court, and was at issue. No question is raised as to the Court having had jurisdiction of the parties or of the subject of the action. Now conceding, for the purposes of this argument, that the Court should have proceeded to try said cause *de novo*, instead of adopting the findings, conclusions, and judgment of the late District Court, it must be obvious that the only remedy for that error is an appeal. If, after acquiring jurisdiction of the parties and subject matter of the action, a Superior Court should order judgment in favor of one of the parties without a trial, that

judgment would neither be "without or in excess of the jurisdiction of such tribunal," although it might be erroneous, as any judgment might be if rendered upon the naked pleadings in a case where the pleadings raised a material issue. This conclusion renders it unnecessary for us to express any opinion upon the other questions discussed by counsel.

Application denied, and restraining order granted herein vacated.

We concur: Thornton, J., Myrick, J.

DEPARTMENT No. 2.

[Filed May 19, 1880.]

[No. 6577.]

SMITH, APPELLANT, vs. DAVIES, RESPONDENT.

STATEMENTS ON MOTION FOR NEW TRIAL—PROPOSED STATEMENT AND AMENDMENTS MUST BE ENGROSSED. Nothwithstanding the proposed statement on motion for a new trial, and the amendments there to be allowed by the Judge of the Court below, they will not be regarded as the statement required by law unless they have been engrossed into one, and authenticated by the signature of the Judge.

Appeal from the District Court of the Eighteenth Judicial District, San Bernardino County.

Waters & Swing, *A. B. Paris*, and *C. W. C. Rowell*, for appellant.

Rolfe, *Curtis & Brown*, and *J. D. Boyer*, for respondent.

By the Court:

In this cause there is no statement on motion for a new trial which this Court is authorized to consider.

It appears that the proposed statements and amendments were allowed by the Judge of the Court below, but the statement and amendments were never engrossed and authenticated by the signature of the Judge.

Such documents not engrossed into one, and attested by the signature of the Judge, have never been regarded as the statement required by law, and it has never been considered by this Court on appeal. (*Baldwin* vs. *Ferre*, 23 Cal. 461.) The order denying the motion for a new trial must therefore be affirmed.

There was also an appeal from the judgment. The only point to which our attention is called in the last mentioned appeal is the order overruling the demurrer to the amended answer of the defendant.

We have examined the answer carefully, and fail to find any errors in the ruling of the Court.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed May 29, 1880.]

[No. 6518]

CHESTER, APPELLANT, vs. BOWER, RESPONDENT.

SALE—ACTUAL AND CONTINUED CHANGE OF POSSESSION. Subject discussed.

EVIDENCE—EXCLUSION OF WITNESSES. It is not error to refuse to exclude parties in interest.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Geo. E. Otis, for appellant.

B. Brundage and *R. E. Arick*, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an action to recover possession of 2638 sheep and $500 damages. Defendant, Sheriff, justified under a writ of attachment issued in the case of *L. Hirshfeld & Co.* vs. *William Glendenning*. Glendenning had been the owner of the sheep, and the question in controversy was whether the sale of them by him to Chester had been, prior to the seizure under the attachment, accompanied with an actual and continued change of possession, and whether the sale was a *bona fide* transaction or for the purpose of hindering, delaying, and defrauding creditors, and particularly Hirshfeld & Co. The jury rendered a verdict for defendant, and plaintiff appealed from the judgment rendered thereon.

After the jury had been impaneled, on plaintiff's motion the Court made an order by which witnesses were excluded from the controversy; but H. Hirshfeld was excepted from the ruling by the Court on the ground that he was a party in interest, though not a party of record. We see no error in permitting H. Hirshfeld to be present. Being a party in interest, he should have been allowed to be present and aid in or observe the progress of the trial.

H. Hirshfeld, examined as a witness for defendant, testified to conversations had by him with Glendenning out of the hearing of plaintiff. It appears that these conversations were parts of talks that the witness had with the parties separately, he reporting to each what the other had said, except the last remark of Glendenning. Plaintiff moved to strike out these conversations with Glendenning, which was refused. We see no error in the ruling. The motion did not separately point to the last remark above referred to.

As a circumstance to show change of possession, plaintiff

testified that the sheep were driven upon land owned by him. To rebut that evidence, defendant put in evidence a a deed of the land from plaintiff to another. Plaintiff offered to prove by parol that the deed was in fact a mortgage. This evidence was ruled out. It was not material to the issue in this case whether the paper was a deed or a mortgage; the material question was, who was in the occupancy of the land.

For the purpose of impeaching the witness Glendenning, and as evidence in rebuttal, plaintiff offered to prove by one Jewett that Glendenning had said, in October, 1877, that he had sold a one-half interest in the sheep to plaintiff. It was an immaterial fact whether he said that or not, as plaintiff does not claim that he purchased from Glendenning in October; nor does he claim a delivery of possession before the first of May, 1878.

Appellant in his points on file alleges as error the giving of the eighth instruction asked for by defendant. No exception to the giving of the instruction appears in the transcript. Even if there had been an exception, it does not appear to us to be an erroneous instruction, or one calculated to mislead the jury.

Judgment affirmed.

We concur: Sharpstein, J., Thornton, J.

United States Circuit Court,

DISTRICT OF CALIFORNIA.

IN RE AH CHONG,
IN RE WONG HOY,
IN RE AH YOU,
IN RE FOO HOY,
IN RE FOO HEE,
IN RE AH MEE,
} ON HABEAS CORPUS.

CHINESE TREATY—CONSTITUTION. The statute of California prohibiting all aliens incapable of becoming electors of the State from fishing in the waters of the State violates the Fourteenth Amendment of the Constitution of the United States, also Articles V and VI of the treaty with China, and is void.

Delos Lake and *Thos. D. Riordan*, for petitioners.
A. L. Hart, Attorney-General, for respondents.

SAWYER, Circuit Judge:

Article XIX of the new Constitution of California, headed "*Chinese*," in addition to the provisions referred to in Parrott's case, recently decided in this Court, forbidding the employment of Chinese by any corporation, or on any State, county, municipal, or other public work, also contains the following provision:

"SECTION 4. The presence of foreigners ineligible to become citizens of the United States is declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all the means within its power. Asiatic coolieism is a form of human slavery, and is forever prohibited in this State; and all contracts for coolie labor shall be void. All companies or corporations, whether formed in this country or any foreign country, for the importation of such labor, shall be subject to such penalties as the Legislature may prescribe. The Legislature shall delegate all necessary power to the incorporated cities and towns of this State for the removal of Chinese without the limits of such cities and towns, or for their location within prescribed portions of those limits; and it shall also provide the necessary legislation to prohibit the introduction into this State of Chinese after the adoption of this Constitution. This section shall be enforced by appropriate legislation."

In obedience to the mandate of the Constitution requiring these provisions to be enforced by appropriate legislation, the Legislature, besides the Act in question in Parrott's case, passed three other Acts. One on April 3, 1880, entitled "An Act to provide for the removal of Chinese whose presence is dangerous to the well-being of communities outside the limits of cities and towns in the State of California," in which it is provided that "the Board of Trustees or other legislative authority of any incorporated city or town, and the Board of Supervisors of any incorporated city and county, are hereby granted the power, and it is hereby made their duty, to pass and enforce any and all Acts or ordinances or resolutions necessary to cause the removal without the limits of such cities and towns, or city and county, of any Chinese now within, or hereafter to come within, such limits. (Stat. 1880, p. 114.) Another Act on April 12, 1880, entitled "An Act to prohibit the issuance of licenses to aliens not eligible to become electors of the State of California," which provides as follows: "Section 1. No license to transact any business or occupation shall be

granted or issued by the State, or any county or city, or city and county, or town, or any municipal corporation, to any alien not eligible to become an elector of this State. Section 2. A violation of the provisions of section 1 of this Act shall be deemed a misdemeanor, and be punished accordingly." And on April 23, 1880, still another Act, entitled "An Act relating to fishing in the waters of this State," which provides as follows: "Section 1. All aliens incapable of becoming electors of this State are hereby prohibited from fishing, or taking any fish, lobsters, shrimps, or shell-fish of any kind for the purpose of selling or giving to another person to sell. Every violation of the provisions of this Act shall be a misdemeanor, punishable upon conviction by a fine of not less than $25, or by imprisonment in the county jail for a period of not less than thirty days."

All these Acts, as well as the Acts and constitutional provisions considered in Parrott's case, are *in pari materia*; and being so, indicate and illustrate the motive or purpose of the passage of any one of them. The petitioners in the several cases, subjects of China of the Mongolian race, were arrested for taking fish in San Pablo Bay within the State, and selling the same in violation of the provisions of the last named Act, tried and convicted before the proper court, and sentenced to imprisonment for the period of thirty days. Being imprisoned in pursuance of the judgments, they severally sued out writs of *habeas corpus*, and now ask to be discharged on the ground that their imprisonment is in violation of our treaty with China, commonly known as the Burlingame Treaty, and of the Fourteenth Amendment to the National Constitution. The Attorney-General, who appears for the respondent in the interest of the State, does not seek to re-open the question decided in Parrott's case, but he endeavors to distinguish the two cases, and relies upon *McCready* vs. *Virginia*, 94 U. S. 391, to support the distinction. Citizens of Maryland were in the habit of crossing over the line into Virginia, and planting oysters in the waters of the latter State. The State of Virginia, desiring to preserve the profits of the business to its own people, passed an Act making it an offense for citizens of other States to take oysters from or plant them in the waters of Virginia. McCready was convicted and fined for planting oysters in Ware River, one of the waters of Virginia, in violation of this Act. He claimed the Act to be void on the ground that it was passed in violation of that provision of the National Constitution which says "Citizens of each State

shall be entitled to all the privileges and immunities of citizens in the several States." The Supreme Court held that the right to take fish in the public waters of the State is not a privilege of inter-State citizenship. It held the State to be the owner, subject to the right of navigation, of the tide lands and the tide waters covering them; also of the fish therein, so far as capable of ownership, while running in the waters. The Court, speaking by the Chief Justice, says: "These (the fisheries) remain under the exclusive control of the State, which has consequently the right in its discretion to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the State thus acquire comes not from their citizenship alone, but from *their citizenship and property combined. It is in fact a property right, and not a mere privilege or immunity of citizenship.*" (94 U. S. 395.) The right of citizens of Virginia to fish in the public waters of the State, therefore, is a *property right* vested in the citizen by reason of his local citizenship and as one of the common owners, and not a mere general privilege; and the title to the property being in the public—in the State—it was held that the State might exclude all others than citizens, the common owners, from enjoying the right. The Court further says: "The right thus granted is not a privilege or immunity of *general* but *special* citizenship. It does not 'belong of right to the citizens of all free governments,' but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed. They, and they alone, owned the property to be sold or used; and they alone had the power to dispose of it as they saw fit. They owned it, not by virtue of citizenship merely, but of citizenship and domicile united—that is to say, by virtue of a citizenship confined to that particular locality." (*Ib.* 396.)

Citizens of other States having no property right which entitles them to fish against the will of the State, *a fortiori*, the alien, from whatever country he may come, has none whatever in the waters or the fisheries of the State. Like other privileges he enjoys as an alien by permission of the State, he can only enjoy so much as the State vouchsafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the State, therefore, while the Germans, Italians, Englishmen, and

Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum*, without price, charge, let, or hinderance, is to prevent him from enjoying the same privileges as are "enjoyed by the citizens or subjects of the most favored nation;" and to punish him criminally for fishing in the waters of the State, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions "as are enjoyed by the citizens or subjects of the most favored nation;" and such discriminations are in violation of Articles V and VI of the treaty with China, cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the State may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privilege, it must permit all others to enjoy, upon like terms, the same privileges whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

The Fourteenth Amendment of the National Constitution provides that "no State shall * * * deny to *any person* within its jurisdiction the equal protection of the laws." To subject the Chinese to imprisonment for fishing in the waters of the State, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected, and it is to deny to them the equal protection of the laws, contrary to those provisions of the Constitution. (Parrott's Case, 21 Alb. Law Jour. 387; *Strauder* vs. *West Virginia*, 10 Cent. Law Jour. 227.) It is obvious also, from a consideration of these various provisions of the new State Constitution, and the several statutes *in pari muteria* referred to, considered in connection with the public history of the times, that the Act relating to fishing in question was not passed in pursuance of any public policy relating to the fisheries of the State as an end to be attained, but simply as a means of carrying out its policy of excluding the Chinese from the State, contrary to the provisions of the treaty. The end to be accomplished being unlawful, as we held in Parrott's case, it is unlawful to use any means to accomplish the unlawful object, however proper the means might be, if used in a proper case and for a legitimate purpose.

The Act is clearly unconstitutional, and a violation of the treaty in discriminating against the Chinese and in favor of aliens of the Caucasian race in all other respects similarly situated. Acts when performed by Chinese are made an offense punishable by imprisonment, while the same acts, performed in the same manner and under the same circumstances by other aliens, are not an offense; and such other aliens are exempt from the punishments denounced by the law against them. It is impossible, therefore, to say that the Chinese "enjoy the same privileges, immunities, and exemptions" as are "enjoyed by the citizens or subjects of the most favored nation," as is stipulated they shall by the treaty, or that the "State," by this Act, does not "deny" to them "the equal protection of the laws," contrary to the Fourteenth Amendment to the National Constitution.

While it is not very likely that the Act in question was *in fact* intended by its framers to apply to any but Chinese, yet, owing to carelessness in the phraseology used, others than Chinese may have occasion to invoke the National Constitution for their protection. The language is: "All *aliens incapable* of becoming *electors* of this State are hereby prohibited from fishing," etc. By Article II of the Constitution, the right of suffrage is limited to "*male* persons;" so that all alien women are "*incapable of becoming electors*," and being so, are within the terms of the statute; so that German, French, Italian, English, and Irish women, before becoming citizens, are forbidden to take fish, shrimps, lobsters, oysters, etc., in the waters of California. So also, under the Act of April 12, before cited, it is provided that "no license to *transact any business or occupation* shall be granted or issued by the State, or any county or city, or city and county, or town, or any municipal corporation, *to any alien not eligible to become an elector of the State*;" and the violation of this provision is made a punishable offense. So that, under the terms of this Act, it is an offense to grant or issue a "license to transact *any business or occupation*" to any alien Caucasian woman; and alien women of European extraction will be unable to engage in any such "business or occupation" as requires a license. A similar infelicity of expression is found in Article II of the Constitution, relating to the right of suffrage, in which it is provided "that no native of China * * * shall ever exercise the privileges of an elector in this State," without regard to the race to which he belongs. Many persons of the Caucasian race are naives of China, and probably not a few descendants of citizens of the

United States, who would fall within the terms of this provision.

Section 4, Article XIX, of the State Constitution, in obedience to which the Act now in question was passed, provides that "the presence of foreigners *ineligible to become citizens* of the United States is declared to be dangerous to the well-being of the State, and the Legislature shall discourage their immigration by all means within its power." It certainly cannot be the "ineligibility to become citizens" that renders the presence of foreigners "dangerous to the well-being of the State." If the presence of the Chinese as aliens, intending, dead or alive, to return or be returned to their own country, is objectionable to our citizens as being "dangerous to the well-being of the State," it is not difficult to perceive that their presence as citizens, permanently domiciled and multiplying in the State, would be far more objectionable and obnoxious to the welfare of our people. If ineligibility to citizenship were the only objection, it could easily be obviated by striking the single word "white" from the naturalization laws. Indeed, in the late revision of the statutes, the word "white" was inadvertently omitted; but our people made haste to procure its re-insertion by amendment at the earliest opportunity. Thus from June 22, 1874, to February 18, 1875, Chinese were eligible to citizenship. (*In re Ah Yup*, 5 Sawyer, 155.) But the people of California were not satisfied with their eligibility, and in deference to their wishes they were again made ineligible to citizenship. So ineligibility to citizenship is not the dangerous or objectionable feature. The real objection is more deeply seated and more substantial. Many believe that the time has come when all naturalization laws should be abolished. Should Congress come to entertain that view, and repeal the naturalization laws, *then all aliens* would fall under the ban of this provision of the State Constitution.

These various provisions are referred to as instances illustrative of the crudities, not to say absurdities, into which constitutional conventions and legislative bodies are liable to be betrayed by their anxiety and efforts to accomplish, by indirection and circumlocution, an unconstitutional purpose which they cannot effect by direct means.

The Act under which the several prisoners are held being void, for the reasons stated, they are in custody in violation of the Constitution and a treaty of the United States, and are entitled to be discharged; and it is so ordered.

June 9, 1880.

Legal Facetiæ.

WAIL FROM A STUDENT OF LAW.

Ask not for essays reflective or critical;
  Bid me not breathe antiquarian lore;
Though I've a mind that is most analytical,
  Seek not for gems from my fathomless store.
Science, for me, may continue in fixity,
  Art be neglected, and letters decay.
Off with the raptures of learned prolixity!—
  I must to law give my talents for aye.

Blest with a nature extremely poetical,
  Low to Apollo I'd bow if I could;
But—and the thought, you'll admit, is pathetical—
  "Vaulting ambition" is nipped in the bud.
Save 'tis an ode to some learned justiciary,
  Lyrical subjects engage me no more;
For, as my thoughts are fixed on the judiciary,
  Buried I am in forensical lore.

Others may revel in sentimentality,
  Plaintively warbling of "Death" and "the Tomb,"
Bathing their souls, with a pretty formality,
  Deep in the waters of (lyrical) gloom.
'Stead of enjoying *my* taste for the serious,
  Save what too serious is found at the courts,
I must (O Fate, how absurdly mysterious!)
  Ponder dull "cases," "digests," and "reports."

THE following anecdote is told by the Rev. Dr. Hawthorne, formerly pastor of the First Baptist Church of Montgomery, Ala., now of Richmond, Va., as his first experience as a legal tyro: "When I entered the practice of the law, the Judge of the Court appointed me to defend a man who was charged with a penal offense. The trial came on. I had carefully cut and dried my speech, and invited all my friends to be present. My friends, and even the Judge, pronounced my maiden effort an elegant and polished address. The jury took the case, but, to the consternation of my friends, in a very few moments, returned a verdict of *guilty*. The Judge asked my client if he wished to offer any reason why the verdict should not stand. "Yes, may it please your Honor," promptly returned the convicted man, "if I had had a lawyer to defend me, I would now be free."—*Southern Law Journal and Reporter.*

AT a legal investigation of a liquor seizure the Judge asked an unwilling witness: "What was in the barrel that you had?" "Well, your Honor," replied the witness, "it was marked 'whisky' on one end of the barrel, and 'Pat Duffy' on the other end, so that I can't say whether it was whisky or Pat Duffy was in the barrel, being as I am on my oath."

Pacific Coast Law Journal.

VOL. V. JUNE 19, 1880. No. 17.

[The LAW JOURNAL has telephonic connection with all portions of the city. Our patrons are cordially invited to call at the office, No. 511 Montgomery Street, and send any information or directions desired. We have connection with the New City Hall, and will have any message intrusted to us delivered to any part of the Hall. Please communicate to us any orders concerning your briefs and transcripts, or any matters relating to the JOURNAL. The telephone used by us is the "Bell."]

Current Topics.

WE take pleasure in notifying our patrons and the public that we have purchased the interest of J. H. Carmany in the DAILY LAW JOURNAL. The change of proprietorship will take place July 1, 1880. The new proprietors will endeavor to improve the paper in many respects, among which will be the publication of practice cases—when of general interest—of the lower courts, and also the opinions of the Supreme Court in cases of public or general importance, immediately after their rendition. The business department of the DAILY LAW JOURNAL will continue under the charge of James H. Stockwell, Esq., who has so ably conducted the paper since its establishment. On the first of July the DAILY LAW JOURNAL will appear in a new dress.

THE Supreme Court of the United States (October term, 1879), in *Hatch et al.* vs. *Dana*, held the liability of a subscriber for the capital stock of a corporation is several and not joint, and he becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription, and a judgment creditor of an insolvent corporation is at liberty to proceed against one or more of delinquent subscribers to recover the amount of his debt, without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution. And a previous call need not be made, though the subscription, by its terms, is to be paid "as called for by said company."

Supreme Court of California.

DEPARTMENT No. 2.

[Filed May 28, 1880.]

[No. 10,492.]

THE PEOPLE, RESPONDENT,

VS.

JOSE MARIA ALVISO AND PACHECO ALVISO, APPELLANTS.

SUFFICIENCY OF INDICTMENTS FOR MURDER. The rule respecting the sufficiency of indictments in the following language, "did feloniously and unlawfully, and of their malice aforethought, kill and murder," etc., established by former decisions, reaffirmed.

SEPARATE TRIAL. After defendants (indicted for murder) waive a separate trial, they cannot afterward, though before the jury was sworn, demand a separate trial.

BILL OF PARTICULARS. A defendant (indicted for murder) is not entitled to demand of the prosecution a bill of particulars of the evidence relied on to support the indictment.

HUSBAND AND WIFE—EVIDENCE FOR AND AGAINST. Where the relation of husband and wife does not exist, though the parties may be living together as such, they may testify for or against each other.

DISTANCE—ESTIMATE OF. It is not error to allow a witness to estimate distance without having first measured it with a chain or rule.

CORPUS DELICTI. Where the evidence tended to show that the defendants went to the house of Ruhland for the purpose of killing him and appropriating his sheep to their own use; that in pursuance of that object one of them shot him once in the head and once in the back, either of the shots being likely to produce death; that Ruhland was never again seen or heard of; that that night was a dark one, they built a large fire, and that subsequently remnants of a few bones were found in the ashes; that the fire consumed the body of Ruhland; that the sheep were taken possession of by defendants, the wool sold, and the proceeds appropriated to their own use: *Held*, sufficient to establish the *corpus delicti*.

Appeal from the County Court of Monterey County.

Henry V. Morehouse, District Attorney, and *S. F. Geil*, for respondent.

Gregory & Shipsey, for appellants.

MYRICK, J., delivered the opinion of the Court:

The defendants were indicted for the murder of John Ruhland. The indictment charges that on a day named, in the county of Monterey, the defendants "did feloniously and unlawfully, and of their malice aforethought, kill and murmurder one John Ruhland, contrary," etc. The defendants demurred to the indictment on the grounds that the facts stated do not constitute a public offense; that it does not

contain a statement of the acts constituting the offense charged in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended; and that it is not certain and direct as regards the offense charged, nor the particular circumstances of the offense. The Court overruled the demurrer, and such ruling is assigned as error—counsel admitting that the decisions would sustain the indictment, but urging a reconsideration of the rules established. We are satisfied that the decisions are correct on principle, and that the Court below did not err in the ruling.

After the defendants had pleaded not guilty, the case was set down for trial, and the defendants in open court waived a separate trial. At the request of defendants' counsel, the jury was drawn, selected, and accepted. On the following day, before the jury was sworn, defendants moved the Court for a separate trial, which motion was denied; and this is alleged as error. After defendants have expressly waived a separate trial, we see no error in refusing their application therefor. It was at most a matter of discretion, and there was no abuse of discretion in denying the motion.

Before the commencement of the trial, the defendants moved the Court that the prosecution be ordered to furnish to the defendants a bill of particulars of the evidence relied on to support the indictment, on the ground that they were informed that the indictment was found on the testimony of one Eulario Martinez, whose name was endorsed on the indictment, who testified to the killing on a certain day and at a certain place, and that they are informed that the prosecution may abandon the testimony of Martinez, and attempt to prove by one Juan Valdez that deceased was killed at another time, at a different place, and under different circumstances; and that by reason of such conflicting information, and of the generality of the indictment, the defendants did not know what case they were to meet. The denial of the motion by the Court is assigned as error. Our attention has not been directed to any section of the Penal Code directing a bill of particulars to be furnished to a defendant on trial upon a criminal charge, and we do not call to mind any rule of law directing the same to be done. We see no error in the ruling.

One Rosa Smith was offered as a witness for the prosecution, and was sworn and examined, notwithstanding the objection of defendants. On being examined as to her competency as a witness, she testified: "I have three children by

the defendant Pacheco Alviso? I have been living with him as his wife about seven years. In the community where we live we have passed and recognized each other as husband and wife. We have not been received as husband and wife by our neighbors. We have been well received by them. In February last I lived with Pacheco Alviso as his wife, and he with me as my husband. Our neighbors have regarded us as living together without being married, but they have received us well. We have had no relations with respectable married people. We were not married by the church or by the law." The objection that she was the wife of the defendant Pacheco Alviso, and could not be sworn as a witness, was overruled by the Court. We see no error in this ruling. The relation of husband and wife did not exist between the witness and Pacheco.

An objection was made that the alleged killing was not in Monterey County, nor within 500 yards of the line between that county and San Benito County. That question was fully submitted to the jury (section 782, Penal Code), and the verdict is conclusive, the evidence being conflicting. An objection was made to the testimony of a witness, a county surveyor, who had not actually measured the distance from the county line, but who had been upon the ground, and was asked to give his estimate of the distance. The objection was overruled by the Court. There was no error in the ruling. To hold it to be error would be to hold that no estimate of any distance, even the width of a road or the size of a room, could be given, unless the witness had gone over the space with chain or rule.

The next point for consideration relates to the *corpus delicti*. The defendants urge that this has not been shown; that the body of deceased not having been discovered, an essential fact in any charge of murder—viz., death—has not been established. In establishing a charge of murder, two facts are essential to a conviction—viz., the death of the alleged victim, and the existence of criminal agency as the cause.

It is very seldom that a conviction occurs without positive proof of the former, either by eye-witnesses of the homicide or the subsequent discovery of the body; and while the general rule is clearly laid down, yet the authorities concede that there may be exceptions. Thus Wharton, in his work on Homicide, section 637, relates instances of the human body being disposed of by fire, or boiled in potash, or dissolved by acids, rendering it impossible that it should ever be produced, and concludes: "It is clear that in

such cases the *corpus delicti* may be proved circumstantially or inferentially."

In the case at bar the evidence offered by the prosecution tended to establish the following facts:

In February, 1879, John Ruhland, a German (familiarly known as Dutch John), lived in a small cabin in the Gabilan Mountains, near the line between Monterey and San Benito counties. He owned some five hundred sheep and three hundred lambs. The only occupant of the cabin with Ruhland was an old man, a Mexican, named Juan Valdez. On a day in February, about the 11th or 12th, Valdez being alone at the cabin, the defendants came there about noon. After remaining a short time, they saddled their horses and rode away. In the afternoon they returned, unsaddled their horses, and told Valdez: "Friend, gather your things up and leave immediately; we are taking a bad step within the last few days." Valdez was in the act of gathering what he had, when they said: "Stop; John is coming." Ruhland arrived at the house as if going inside; but before he arrived at the door, Jose Maria (defendant) stopped him, with a pistol in his hand. Jose told Pacheco (the other defendant), "Go and tie him." Pacheco tried to catch him, but he did not allow himself to be caught. Then, when Pacheco retired on one side, Jose Maria shot him, the ball taking effect in or on one side of the eye. Ruhland staggered and fell. He rose, and was going inside the house when Jose Maria shot him in the back. Pacheco then went to help Valdez catch his horse, and while they were thus engaged Valdez heard a shot from the cabin. Pacheco said to Valdez: "Be in a hurry; catch your horse; don't be afraid; we are not going to hurt you; you are too old; God will kill you; but you mustn't say anything, otherwise we will kill you." Valdez caught and saddled his horse and rode away. Ruhland has not since been seen or heard of. Not far from the cabin was a large white oak tree that had been cut down for some time. It was lying at a picket fence. It was a tall tree, and about ten feet from the butt it branched in a fork. Neither the fence nor the tree were then at all burned. The day was dark and foggy. That afternoon, towards night, two boys passing near by, in hunting for a lost saddle, observed a fire not far from the cabin, and near by saw and recognized the defendants.

Pacheco at that time was living with the woman Rosa Smith. The defendants left her house before noon, telling her that they were going to a dance in Chualar Cañon, and returned next morning. Pacheco told the woman that they

had brought some sheep; that Dutch John gave him the sheep to take care of for him. They left the sheep up the mountains. The defendants soon after sheared the sheep and hauled the wool to Salinas, where they sold it through an employee, and received therefor $204.70. To some they said that they owned the sheep; to others that they were caring for them for Ruhland. After receiving the money they divided it, Pacheco paying some bills of his own and making purchases, and Jose Maria sending away $20 and losing $40 at cards.

Pacheco was arrested in May, but was soon liberated. In a conversation with Rosa Smith she asked him why he was arrested, and if it was true that they had found the dead body of Ruhland. He replied that they could find nothing; that Jose Maria had killed him and burned the body; that he (Pacheco) wouldn't help, and Jose Maria killed him. He was very down-hearted; said he was sick. He said that the killing and burning took place in February, at the time they said they were going to a party at Chualar Cañon; that the night of the fire he recognized the boys Cipriano and Eulario passing by. He said that, at the time Dutch John was killed, an old man was there, and Jose Maria wanted to kill him; but he (Pacheco) prevented it. Pacheco offered to sell some of the sheep, and gave away some. Search was made for Ruhland, but without avail.

On examining the premises, the oak tree was found to have been burned; also the branches and several lengths of the picket fence, and some posts. The posts had been pulled up. Wire had been used on the fence. Several pieces were found curled together where the fire had been. The ashes from the fire were not scattered, but lay in a body where the fork of the tree had been; and in the ashes were a few pieces of bones, too small to be identified as human bones.

The defendants were indicted, and Pacheco arrested. Search was made for Jose Maria by a posse. They came upon him in the mountains. When he saw the men he fled. He was followed some three miles and escaped, but was subsequently arrested.

After Pacheco was arrested he was asked where Ruhland was when he sheared the sheep. He replied at his house. He was asked where Ruhland was when he took the wool to Salinas and sold it. He replied at his house. Both of which statements were untrue.

The foregoing is a brief synopsis of the evidence given for the prosecution. It appears that this evidence tended to show that the defendants went to Ruhland's house for the

purpose of killing him and appropriating his sheep to their own use; that in pursuance of that object one of them shot him at least twice, once in the head and once in the back, either of the shots being likely to produce death; that Ruhland was never again seen or heard of; that that night—a dark one—they built a large fire, and that subsequently remnants of a few bones were found in the ashes; that the fire consumed the body of Ruhland; that the sheep were taken possession of by the defendants, the wool sold, and the proceeds applied to their own use.

This evidence being submitted to the jury under proper instructions, was sufficient to establish the *corpus delicti*—viz., that Ruhland had come to his death, and by criminal agency.

There was no error in the instructions given by the Court, nor in refusing the instructions asked for by defendants which were refused.

Judgment and order affirmed.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT NO. 1.

[Filed June 4, 1880.]

[No. 6753.]

THE PACIFIC BRIDGE COMPANY, RESPONDENT, vs. KIRKHAM, APPELLANT.

ENFORCEMENT OF ASSESSMENTS FOR CONSTRUCTION OF BRIDGES. Assessments on lands benefited by the construction of a bridge cannot be enforced if the bridge in part rests on and passes over land which is private property, and which has not been dedicated to public use, or the right of way over it granted.

PLEADING. When a general demurrer has been interposed and overruled, and evidence introduced upon an issue and the Court assumed to pass upon it, the sufficiency of the pleadings to raise such an issue cannot be questioned in the Appellate Court.

Appeal from the District Court of the Third Judicial District, Alameda County.

C. T. Botts, for appellant.

Vrooman & Davis, for respondent.

ROSS, J., delivered the opinion of the Court:

The Legislature in 1867 passed an Act entitled "An Act to authorize the city of Oakland to construct a bridge across the estuary of San Antonio, between Eighth Street and East

Ninth Street," the first and third sections of which are as follows:

"SECTION 1. The City Council of the city of Oakland is hereby authorized and empowered, in its discretion, to order the construction of a wooden bridge across the estuary of San Antonio, from Eighth Street, on the westerly shore of said estuary, to East Ninth Street, on the easterly shore of said estuary. Said bridge may be constructed in such manner, of such dimensions, and with such materials as the City Council shall by ordinance direct; provided, however, that the cost, including incidental expenses of constructing said bridge, shall not exceed the sum of thirty thousand dollars."

"SEC. 3. The contract price of said bridge, the cost of the plans and specifications, the engineer's fees, the cost of advertising, the expenses and salaries of the commissioners hereinafter mentioned, and all other expenses whatsoever incidental to the building of said bridge, shall be held and be considered to be the cost of said bridge; and their sums shall be assessed on the lands mentioned and described in the following section of this Act, in proportion to the benefits accruing therefrom to said several lots, subdivisions, and pieces of land respectively, which said lands are hereby declared to be benefited by the construction of said bridge."

The next section describes the land declared to be benefited, and the succeeding ones provide for the appointment of commissioners, the making and enforcing of the assessments, etc. The Council of the city of Oakland caused the bridge to be constructed, and the assessments to pay for the work were made in accordance with the provisions of the Act. It was to enforce the lien of the assessment against the land of the defendant that the present action was instituted.

The defendant, in his answer, set up as one ground of defense "that the said bridge in part rests on and passes over land which is private property, the right of way over which has never been granted to the city of Oakland, and which has never been dedicated to any public use whatever." If this be true, it must be conceded, we think, on all sides that the assessment cannot be enforced; for no one can be compelled to pay for an improvement of this nature which has been erected upon private property. The principle upon which such assessments are sustained is, that those required to pay will be benefited by the improvement, and will have the use and enjoyment of it. But this benefit could not accrue if the improvement is erected on private property.

In such case neither the public nor those assessed would be entitled to its use, and it might be abated at any time by the owner of the property. The law deeming this averment of the answer denied, there arose in the case, therefore, a material issue as to the ownership of the property upon and over which the bridge was constructed. Evidence was introduced at the trial upon this issue, and in response to it the Court below made the following finding: "That the marsh and tide lands over which said bridge passes were, before the building of said bridge, claimed to be owned in part by the defendant and other persons, and also by a corporation known as the Water Front Company. Before commencing to build said bridge the defendant granted to the city of Oakland the right of way over his interest in said land. The other persons gave their permission and consent to building the bridge over their interest in said land; and the president and members of the Water Front Company, individually, but not in their corporate capacity, also gave their permission and consent to the use of their marsh and tide lands for the purposes of said bridge, and thus dedicated their land to the use of the same."

This finding does not meet the issue. It is not found whether the bridge is or is not, in fact, erected in part upon private property. It is only said that the marsh and tide lands over which it passes were, before the building of the bridge, *claimed* to be owned in part by the defendant and other persons, and by a corporation known as the Water Front Company. Whether or not these parties, or any of them, or any other private persons, did in fact own the land, is not found. And even if the finding could be construed to mean that the parties mentioned did own it, then it would appear that the corporation mentioned is still the owner of a part of it, unaffected by any grant or agreement; for the Court does not expressly find that there was a dedication by the corporation, and the probative facts found do not establish such dedication.

The averment of the answer under consideration is not, as suggested in the supplemental brief of counsel for respondent, necessarily inconsistent with that part of it where it is alleged "that the bridge crosses the portion of the navigable waters of the bay of San Francisco known as the estuary of San Antonio." This latter fact may very well exist with the other fact (if fact it be) that the bridge in part rests upon and passes over private property. Nor do we think the objection now taken by counsel to the sufficiency of the answer to raise the issue in question well taken. The de-

murrer which was interposed and overruled was a general one, and the respondent (plaintiff in the Court below) introduced evidence upon the issue, and the Court assumed to pass upon it. Under such circumstances the sufficiency of the pleading cannot be questioned here. (*Spiers* vs. *Duane*, No. 5962, January session.)

As the cause must be remanded for the reasons suggested, it is unnecessary to determine the other questions argued by counsel.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Morrison, C. J., McKinstry, J.

DEPARTMENT No. 1.

[Filed May 26, 1880.]

[No. 6706.]

TOMPKINS, RESPONDENT, vs. SPROUT, APPELLANT.

FRAUDULENT TRANSFERS—CONVEYANCE UPON TERMS. Where the plaintiff in an action to vacate a sale and require a conveyance of lands from a defendant who had received his conveyance subject to a mortgage lien created prior to plaintiff's rights, and which he had paid off, a condition must be imposed, upon the granting of such prayer, that the defendant be reimbursed to the amount of said lien if it is found that he had no actual knowledge of fraud in the transfer from the party through whom the plaintiff claims, and defendant's grantor.

PLEADING. An answer should set out the nature of the interest in lands claimed by the defendant; but if no demurrer is interposed, and no objection is made to the introduction of evidence upon such an issue made, objection cannot be made in the Appellate Court that the findings are without the issues. (See *Elder* vs. *Spinks*, 53 Cal. 293.)

Appeal from the District Court of the First Judicial District, Santa Barbara County.

Richards & Boyce and *C. Grey*, for respondent.
Hall & Hatch, for appellant.

ROSS, J., delivered the opinion of the Court:

The complaint in this case is a combination of several independent and distinct causes of action, and could not have been sustained had a demurrer been interposed. The main purpose of the action seems to have been to have declared null and void two certain deeds to a block of land situated in Santa Barbara; but in addition to the averments respecting that cause of action, the complaint contains the usual allegation found in a complaint to quiet title, and also in one of ejectment. The prayer is that the adverse

claims of defendant to the premises be determined by the Court; that it be adjudged that the defendant had no title to or interest in the block, and that he be forever debarred from asserting any claim thereto adverse to the plaintiff; that plaintiff recover possession of the premises from the defendant, and that the deeds be decreed to be null and void, and defendant be compelled to execute a conveyance of premises to plaintiff. The complaint was not verified, and the answer was a general denial of all the allegations of the complaint except the allegation "that the defendant claims some estate or interest in said premises in the complaint named adverse to the plaintiff."

The facts upon which the plaintiff sought to have the deeds alluded to annulled, and upon which the Court below did annul them, are substantially as follows: On the 2d day of April, 1877, one Charles Peterson was, and for some time prior thereto had been, the owner of the premises. On that day, in an action then pending in the District Court of Santa Barbara County, a decision was rendered in favor of the plantiff Tompkins, and against the said Charles Peterson and one Johnson, upon a money demand, upon which a final judgment was entered April 7, 1877. On the said 2d day of April, and after the rendition of the said decision, Charles Peterson, for the purpose of defrauding the plaintiff, executed to his brother, Gustav Peterson, a deed to various pieces of property, including the block in question. Gustav received the conveyance with knowledge of the fraudulent intent of Charles, and colluded with him to defraud the plaintiff. On the 24th of April, 1879, the plaintiff caused execution to issue for the enforcement of the judgment recovered by him. The execution was duly levied by the Sheriff on all the right, title, and interest of Charles Peterson in and to the said block, describing the same as standing on the records of the county in the name of Gustav. Under this execution the property was sold for the amount of the judgment, with interest, costs, and accruing costs, the plaintiff being the purchaser. The Sheriff thereupon issued to the plaintiff a certificate of sale in due form, the duplicate of which was duly recorded on the 31st day of May, 1879. No redemption having been effected, the Sheriff, on the 21st of March following, executed plaintiff a deed to the premises. Intermediate to the delivery and recording of the certificate of sale and the execution of the Sheriff's deed—that is to say, on the 28th of September, 1879—the defendant purchased the block of land in controversy from Gustav Peterson, and received a deed therefor from him. The defendant

paid full value for the land, and "did not have actual knowledge of the fact that the conveyance from Charles to Gustav was fraudulent, but did have full knowledge, both actual and constructive, that said block had been levied upon and sold as the property of Charles Peterson as aforesaid, and that plaintiff held the Sheriff's certificate of sale therefor, and also had actual knowledge of the judgment against Charles in favor of plaintiff." Upon these facts the Court concluded that the conveyance from Charles to Gustav Peterson was void as to the plaintiff, and that the defendant acquired no interest in the premises by his purchase from Gustav. The Court below, however, also found as a fact: "7. That at the several dates in these findings before mentioned, down to and including September 28, 1877, there was a valid mortgage upon and against said block 328, amounting on the last named date to the sum of $728.55; that the defendant Sprout received his conveyance to said premises subject to said lien, and assumed the payment thereof as a part of the purchase money, and did thereafter pay off and procure the discharge of the same; that said lien was created by Charles Peterson, by mortgage executed on the 6th day of December, 1876." And the Court also found as a conclusion of law: "6. That defendant has no claim against said premises by reason of his payment of the mortgage lien mentioned in finding number 7," and entered judgment decreeing plaintiff to be the owner of the property, and that the defendant has no interest in or claim upon the same, and forever debarring him from asserting any interest therein adverse to the plaintiff, and further directing the execution of a deed of conveyance of the premises from defendant to plaintiff, etc.

The only point made by the defendant on this appeal is that the Court below should have set aside the conveyance *upon terms*—to-wit, upon the payment by plaintiff to the defendant of the amount paid by the latter in satisfaction of the mortgage lien.

No express mention is made in the complaint or answer of the lien, and it is claimed by the respondent that the seventh finding of the Court is not within the issues made by the pleadings, and cannot therefore be considered. The complaint, however, alleges that the defendant claims some estate or interest in the premises adverse to the plaintiff, and "that the claim of said defendant is without any right whatever, and defendant has not any estate, right, title, or interest whatever in or to said premises, or any part thereof." The answer admitted that the defendant had some claim to the property, but denied that the claim was without right, and

denied that defendant had not any estate or right therein. This, as was held in *Elder* vs. *Spinks*, 53 Cal. 293, raised a material issue; and although the pleader should undoubtedly have proceeded and set out the nature of the interest claimed by the defendant, still there was no demurrer to the answer, and it does not appear that any objection was taken to the evidence introduced under the issue as made. Under such circumstances, the objection now urged that the finding of fact is without the issues, and cannot therefore be considered, cannot be sustained.

There being, at the time the plaintiff recovered his judgment against Charles Peterson, and at the time of the conveyance from Charles to Gustav Peterson, and at the time of the purchase by plaintiff under his execution sale, a valid, subsisting mortgage lien upon the property, it is obvious that the latter cannot be injured by requiring of him payment of the amount of the lien as a condition precedent to vacating the sale to the defendant. The Court below expressly found that defendant had no actual knowledge of the fact that the conveyance made from Charles to Gustav Peterson was fraudulent, and that the conveyance from the latter to the defendant was constructively fraudulent only. In such case a court of equity will protect the purchaser as well as the creditor, where, as here, both can be protected without injury to either.

In *Clements* vs. *Moore*, 6 Wall. 312, it is said: "A sale may be void for bad faith, though the buyer pays the full value of the property bought. This is the consequence where his purpose is to aid the seller in perpetrating a fraud upon his creditors, and where he buys recklessly with guilty knowledge. When the fact of fraud is established in a suit at law, the buyer loses the property, without reference to the amount or application of what he has paid; and he can have no relief either at law or in equity. When the proceeding is in chancery, the jurisdiction exercised is more flexible and tolerant. The equity appealed to—while it scans the transaction with the severest scrutiny—looks at all the facts; and giving to each one its due insight, deals with the subject before it according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in an action at law. In others it allows a security to stand for the amount advanced upon it. In others it compels the buyer to account only for the difference between the under price which he paid and the value of the property. In others, although he may have paid the full value, and the property may have passed beyond the

reach of the process of the Court, it regards him as a trustee, and charges him accordingly. When he has honestly applied the property to the liabilities of the seller, it may hold him excused from further responsibility. *The cardinal principle in all such cases is, that the property of the debtor shall not be diverted from the payment of his debts to the injury of his creditors, by means of the fraud.*"

In *Coiron* vs. *Millandon*, 19 How. 115, the Court, by Mr. Justice Nelson, said: "A court of equity, in setting aside a deed of a purchaser upon grounds other than positive fraud on his part, sets it aside upon terms, and requires a return of the purchase money, or that the conveyance stand as a security for its payment." And in *Beau* vs. *Smith*, 2 Mason, 296, Judge Storey said: "I agree to the doctrine laid down by Mr. Chancellor Kent in *Boyd* vs. *Dunlap*, 1 Johns. Ch. R. 478, and *Sands* vs. *Codwise*, 4 John R. 536, 549, that a deed fraudulent in fact is absolutely void, and is not permitted to stand as a security for any purpose of reimbursement or indemnity; *but it is otherwise* with a deed obtained under suspicious or inequitable circumstances, or which is only *constructively fraudulent.*" Speaking of the distinction between actual and constructive fraud, he proceeds: "The former (actual fraud) makes the conveyance utterly void" as to creditors and others whom it intends to injure, and therefore it cannot be permitted to stand, as to them, as a security for advances. But if no such actual fraud was originally in contemplation, the law adjudges the conveyance fraudulent on motives of public policy, as in cases of voluntary or other conveyances, which are void against creditors and purchasers; there, if any advances have been made, or any other equities arise, they may be enforced by the Court in favor of the grantee."

Applying the principles thus announced to the facts of the case under consideration, it is clear that the Court below should have imposed upon the plaintiff, as a condition to vacating the sale to defendant, and requiring a conveyance of the property from him to the plaintiff, the payment by the latter to the defendant of the amount paid by the defendant in the satisfaction and discharge of the mortgage lien existing upon the property during the time already stated. In this way, and in this way only, justice can be done between the parties.

Judgment reversed, and cause remanded to the Court below, with directions to enter judgment on the findings not inconsistent with this opinion.

We concur: McKee, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed May 29, 1880.]

[No. 10,522.]

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT.

vs.

REUBEN J. MITCHELL, APPELLANT.

PRESUMPTION OF GUILT—PROVINCE OF JURY. The Constitution of this State prohibits the Courts from charging the jury with respect to matters of fact; so where the Court below charged the jury that proof of the possession of property in the hands of defendant recently after the same property was stolen, unless the possession of the same is satisfactorily accounted for by the defendant, raises a *presumption* of guilt against the defendant, is erroneous. It is an interference with what is the exclusive province of the jury.

Appeal from the Superior Court of Tehama County.

Attorney-General, for respondent.
J. T. Allison, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

This is an information for burglary, filed by the District Attorney of Tehama County against the defendant and one George Kane. The information charges "that Reuben J. Mitchell and George Kane, on or about the 4th day of March, 1880, at and in the county of Tehama and State of California, did feloniously enter the meat shop of George W. Vestal with intent to commit petit larceny, contrary to the form, force, and effect of the statute," etc. Reuben J. Mitchell was convicted of the crime charged in the information, and from the judgment of conviction, as well as from the order of the Court below denying his motion for a new trial, he brings this appeal. It will be necessary for this Court to pass upon only one error found in the transcript, as it is sufficient to make it our duty to reverse the judgment of the Superior Court.

The following instruction was given to the jury: "Proof of the possession of property in the hands of defendant recently after the same property was stolen out of the meat shop of Vestal, unless the possession of the same is satisfactorily accounted for by the defendant, raises a presumption of guilt against the defendant." There was evidence in the case tending to show that the meat stolen from the shop of Vestal, or at least a portion of it, was found in the possession of the defendant Mitchell very soon after the larceny was committed.

The question presented by the foregoing instruction was before the late Court in the case of *The People* vs. *Walden*, 51 Cal. 588, and the Court there says: "The Court below charged the jury that possession by the defendant of the key, unexplained, raises a reasonable presumption that he had it for the purpose shown by the evidence it could be used for—or, in other words, if you believe it would open the clerk's office where these ballots were kept, then its possession by the defendant, unexplained, raises a reasonable presumption that he had it for the purpose of opening that door." The Court proceeds to say: "In no view can this charge be sustained. If it be said that it was an attempt to charge in respect to a legal presumption, it was clearly error, since no such presumption would arise from the fact stated as a matter of law. If it was an attempt on the part of the Court to instruct the jury that the existence of one fact, in view of the ordinary experience of mankind and connection of events, must be presumed from the existence of another, this was an interference with what, as we have shown, is the exclusive province of the jury. It was charging the jury with respect to matters of fact, and was a contravention of section 17, Article VI, of the Constitution of the State." Section 19, Article VII, of the present Constitution contains the same prohibition.

In the recent case of *The People* vs. *Wong Ah Ngon*, No. 10,436 (4 Pac. C. L. J. 552), this Court had occasion to pass upon an instruction similar to the one now under consideration. In that case the Court below, employing the language found in Wharton's American Criminal Law, charged the jury that flight raised a *presumption* of guilt, and the judgment was reversed for error in the instruction. Flight was a circumstance which the jury might consider; but it was held error for the Court to charge the jury that flight *per se* raised a *presumption* of guilt. So in this case it would have been proper for the Court below to have instructed the jury that the possession of stolen goods recently after the larceny was committed was a circumstance proper to be considered by them (*People* vs. *Gill*, 45 Cal. 285); but to tell them that such possession raised a *presumption* of guilt was in violation of the constitutional provision which prohibits the Court from charging the jury with respect to matters of fact.

For this error the judgment and order of the Court below are reversed, and the cause is remanded for a new trial.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT NO. 2.

[Filed May 15, 1880.]

[No. 10,451.]

THE PEOPLE, RESPONDENT,

vs.

A. H. SMALLMAN, W. H. M. SMALLMAN, APPELLANTS.

CRIMINAL LAW. Where there is evidence tending to prove the guilt of an accused party, the verdict will not be disturbed on the ground that it was contrary to the evidence.

INSTRUCTION. An instruction which goes to the acquittal of defendant must be broad enough to cover the essential facts of the case.

Appeal from the Municipal Criminal Court, San Francisco County.

Attorney-General, for respondent.
Geo. W. Tyler, for appellants.

THORNTON, J., delivered the opinion of the Court:

The defendants were indicted by the grand jury of the city and county of San Francisco for the crime of grand larceny. They were charged in the indictment with feloniously stealing, taking and carrying away, contrary to the form, etc., 100 pieces of the current gold coin of the United States, of the denomination of double eagles, or $20 pieces, and of the value of $20 each, said money being the property of William Cooper and Margery Wells Cooper. The defendants pleaded not guilty to the indictment, and on the trial the jury found them guilty as charged. They then moved an arrest of judgment and for a new trial, which were denied. Sentence was pronounced by the Court, from which sentence and the order denying a new trial this appeal is prosecuted.

On the trial, several exceptions were reserved to the admissibility of the evidence, which we will proceed to consider. The above named Margery Cooper was called as a witness by the prosecution and examined. On her cross-examination, counsel for the defendants offered, for the purpose of affecting her credibility, an affidavit made and signed by her on the 16th day of January, 1879. It also came out on the cross-examination that the affidavit was written by one Carey, who presented it and read it to the witness, when she signed it and swore to it. The evidence tended to show at this time that Carey was employed by the defendant Amelia Smallman to draw this affidavit, and have it signed and sworn

to by the witness; afterwards there was direct testimony to this effect. On the re-direct examination, the witness was asked as to the circumstances under which the affidavit was made, and what conversation she had with Carey about it.

The defendants objected to any conversation of witness with Carey in relation to this affidavit, which was had in the absence of defendant Amelia. The Court overruled the objection and admitted the evidence, to which the defendants excepted. We see no error in this ruling. It was proper to ask the witness as to every matter which occurred in relation to and in connection with the affidavit. The conversation had about it while it was being prepared and signed, and the oath made to it, were parts of the transaction, which were as properly admissible as the affidavit itself.

The defendants, on the cross-examination of the above named William Cooper, drew out the fact that the witness had consulted, in relation to the transaction out of which the indictment grew, F. E. Southerland, and in part developed what had occurred between them as to the matter. The plaintiff was permitted to call out on cross-examination against the objection and exceptions of defendants all that had taken place between the witness and Southerland in the consultation or consultations inquired about. We see no error in this ruling of the Court.

Sarah Selleck was called as a witness by the defense. It appears that she was called to impeach Margery Cooper by proving a statement contradictory to what Mrs. Cooper had deposed on the trial. She was asked by defendants' counsel the following question: "Did Mrs. Cooper ever request you to go and see Mrs. Smallman in reference to any points in stocks?" The prosecution objected to this question; the objection was sustained, and defendant excepted. Nevertheless, the witness appears to have answered the question. She said: "I never had any conversation with Mrs. Cooper with reference to her procuring Mrs. Smallman to invest money for her in stocks."

This question was then put by counsel for defendants: "Did Mrs. Cooper ever ask you to intercede for her and get Mrs. Smallman to invest any money in stocks for her—to intercede with her?" To this prosecution objected. The Court sustained the objection, and defendants excepted. This ruling is now assigned as error on behalf of defendants.

If this question was intended to impeach Mrs. Cooper, by showing she had made contradictory statements, the predicate had not been had for so doing, by interrogating her in relation to them. If, to show the relations existing between

Mrs. Smallman and Mrs. Cooper, the character of those relations so clearly appears from the testimony which was adduced before the Court, we cannot see that the defendants were injured by disallowing it. It does not appear that there was any conflict in the testimony as to the character of the relations existing between Mrs. Cooper and Mrs. Smallman; nor was any question made in relation to it. The testimony clearly shows that they were on intimate and friendly terms. The witness (Mrs. Selleck) having just deposed that she never had any conversation with Mrs. Cooper with reference to her procuring Mrs. Smallman to invest money for her in stocks, we cannot discern any error committed by the Court in refusing to allow the question.

We find no error on the record or the rulings of the Court in relation to admitting or excluding testimony, nor did the Court err in refusing to advise the jury to acquit defendants at the close of the testimony for the people.

The refusal of the Court to grant a new trial was attacked for the errors above referred to, and on the further grounds that the verdict was contrary to the law, and that it was contrary to the evidence—that the evidence clearly showed that there was no larceny.

The Court, at the instance of defendants, gave to the jury the following instruction:

"If the jury believe, from the evidence, that the $2,000 was delivered by Mrs. Cooper to Mr. Smallman, with the understanding and agreement that the same was to be invested by him in stocks, and he did so invest it, you should find the defendants not guilty."

The defendants asked the Court to give the following, which was refused:

"If the jury believe from the evidence that Mrs. Cooper gave W. H. M. Smallman the $2,000 of her own free will, with the understanding and agreement that he was to invest the same or have the same invested in stocks, either in her own name or otherwise, then you should find the defendants not guilty."

This request was too narrow. If given, it would have withdrawn from the consideration of the jury the testimony connecting the other defendant with the matter under investigation. An instruction which goes to the acquittal of defendants must be broad enough to cover the essential facts of the case. There was no error in the refusal of this request, nor do we discover any error in the refusal of the request numbered two (2) asked by the defendants.

We have fully examined and considered the charge which

was given to the jury by the Court below, and find nothing in it which should induce a reversal of the judgment.

We cannot say that the verdict was against law, or contrary to the evidence. There was conflict in the evidence, but there was not a lack of evidence.

The former Supreme Court to which this appeal was taken, as is true of this Court, was invested with appellate jurisdiction in such criminal cases as could come before it on questions of law alone. (Constitution as amended in 1862, Article VI, section 4; Constitution of 1879, Article VI, section 4.) When there was no evidence to establish the charge set forth in the indictment, it would present a question of law, on which the former Court and this Court would be competent to act. This would not be the case where there was evidence tending to prove the guilt of the accused.

For the foregoing reasons the judgment and order must be affirmed, and it is so ordered.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed May 27, 1880.]

[No. 6639.]

IN THE MATTER OF THE ESTATE OF JOHN N. MONTGOMERY.

ADMINISTRATOR'S APPEAL. No appeal will lie from an order denying a petition for a revocation of letters of administration.

Appeal from the Probate Court of Tehama County.

P. B. Nagle, for appellant.

J. S. Belcher and *C. A. Garter*, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal from an order of the Probate Court refusing to grant a petition for the revocation of letters of administration previously granted and issued to J. W. B. Montgomery. The Code enumerates the orders from which appeals may be taken to the Supreme Court from Probate Courts. (C. C. P., sec. 969.) An order denying a petition for a revocation of letters of administration is not included in the enumeration. Therefore no appeal will lie from that order.

Appeal dismissed.

We concur: Myrick, J., Morrison, C. J.

United States District Court,

DISTRICT OF CALIFORNIA.

JOHN LLOYD, ASSIGNEE, ETC., VS. D. J. FOLEY.

BANKRUPTCY—FRAUDULENT TRANSFERS—RIGHTS OF ASSIGNEE. An assignee in bankruptcy cannot maintain an action for the benefit of general creditors against a vendee of the bankrupt to declare the sale of chattels fraudulent and void because the sale was not accompanied by an actual and immediate delivery and change of possession as required by the State statute. The assignee can assert no claims on behalf of general creditors which the bankrupt himself could not have asserted in a contest exclusively between him and his vendee.

R. Thompson, for plaintiff.
H. C. Hyde, for defendant.

HOFFMAN, District Judge:

I am inclined to think that the delivery and change of possession of the property sold to the defendant in this case was sufficient to satisfy the requirements of section 3440 of the Civil Code of California; but, under a recent decision of the Supreme Court of the United States, the inquiry is immaterial. It had been supposed by this Court and the Circuit Court that the sale or mortgage of a chattel, under circumstances which rendered the transaction void as against creditors, was also void as against the assignee in bankruptcy, who represents the creditors. It was considered that any other rule would be unjust to the latter; for the property sold or mortgaged was, by the terms of the statute, subject to their demands, and could have been attached or levied on in execution. The bankruptcy prevented all proceedings on their part; and it seemed to follow, as a necessary consequence, that their rights could be asserted through the assignee for the equal benefit of all.

It is to be feared that the recent decision of the Supreme Court will, or would if the Bankruptcy Act were still in force, open a wide door to the frauds the statute was designed to prevent. Actual fraud, want of consideration, secret trust for the vendor, etc., etc., can rarely be shown. The statute wisely declares that the absence of an actual, immediate, and continued change of possession shall be conclusive evidence of fraud, and shall avoid the transaction as against creditors' subsequent purchases, etc.

The bankruptcy deprives the creditors of the right conferred by the State statute to pursue the property in the hands of the vendee or mortgagee; and the bankrupt, although in the notorious and exclusive possession of the goods, has only to produce or procure some friend to produce a bill of sale or mortgage, valid on its face as between the parties, to secure the withdrawal of, it may be, his entire assets from the assignee, unless the latter is able to show fraud in fact. The whole object of the statute is thus defeated.

The case to which I have referred is *Stewart* vs. *Platt, assignee*, reported in the *Chicago Legal News*, February 28, 1880.

By the laws of New York, every mortgage of chattels not accompanied by an immediate delivery and followed by an actual and continued change of possession, is declared absolutely void as against creditors of the mortgagor and subsequent purchasers in good faith, unless the mortgage shall be filed as directed in the Act.

The Supreme Court held that the mortgage had not been filed as required by the Act. It was therefore void as against creditors, and the decree of the Circuit Court which directed the proceeds to be first applied in satisfaction of the claims of those creditors who had obtained judgments and sued out executions prior to the commencement of the bankruptcy proceedings was affirmed. The Circuit Court further directed that the balance of the proceeds should be paid to the assignee for the purposes of the trust. This part of the decree was reversed by the Supreme Court. It held that the mortgage was valid as between the parties; that "the assignee took the property subject to such equities, liens, or incumbrances as would have affected it had no adjudication in bankruptcy been made; while the rights of creditors whose executions preceded the bankruptcy were properly adjudged to be superior to any which passed to the assignee by operation of law. The balance of the fund, after satisfying those executions, belonged to the mortgagee, and not to the assignee for the purposes of his trust. The latter, representing general creditors, cannot dispute such claim, since, had there been no adjudication, it could not have been disputed by the mortgagor. The assignee can assert, in behalf of the general creditors, no claim to the proceeds of the sale of the property which the bankrupts themselves could not have asserted in a contest exclusively between them and their mortgagee. As between the mortgagee and the mortgagors, the chattel mortgages were and are unimpeachable

for fraud, or upon any other ground recognized in the bankrupt law."

An unrecorded chattel mortgage and a bill of sale, where each is unaccompanied by an immediate and continued change of possession, are in the same predicament; and if the assignee can assert no rights against the mortgagee in the one case, he can assert none against the vendee in the other.

It results, in the case at bar, that even if the delivery of the property sold to the defendant was not accompanied by an actual and immediate delivery as required by law, the assignee can maintain no claim founded on that circumstance.

Judgment for defendant.

United States Circuit Court,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

LEVI STRAUSS ET AL. VS. HENRY W. KING ET AL.

M. A. Wheaton and *George Gifford*, for plaintiffs.
Gilbert M. Plympton, for defendants.

BLATCHFORD, Judge:

This suit is brought on reissued letters patent, granted March 16, 1875, to Jacob W. Davis and Levi Strauss & Co., for an "improvement in pantaloons," etc., the original patent having been granted to them May 20, 1873, on the invention of said Davis. The specification of the reissue says that Davis has invented an "improvement in fastening seams." It proceeds: "My invention relates to a fastening for pocket openings, whereby the sewed seams are prevented from ripping or starting from frequent pressure or strain thereon; and it consists in the employment of a metal rivet or eyelet at each edge of the pocket opening, to prevent the ripping of the seam at those points. The rivet or eyelet is so fastened in the seam as to bind the two parts of cloth which the seam unites together, so that it shall prevent the strain or pressure from coming upon the thread with which the seam is sewed. In order to more fully illustrate and explain my

invention, reference is had to the accompanying drawing, in which my invention is represented as applied to the pockets of a pair of pants. Figure 1 is a view of my invention as applied to pants; *a* represents the side seam in a pair of pants, and *b b* represents the rivets at each edge of the pocket opening. The seams are usually ripped or started by the placing of the hands in the pockets, and the consequent pressure or strain upon them. To strengthen this part I employ a rivet, eyelet, or other equivalent metal stud, *b*, which I pass through a hole at the end of the seam, so as to bind the two parts of cloth together, and then head it down on both sides, so as to firmly unite the two parts. When rivets which already have one head are used, it is only necessary to head the opposite end; and a washer can be interposed, if desired, in the usual way. By this means I avoid a large amount of trouble in mending portions of seams which are subjected to constant strain. My invention is applicable to pantaloons, overalls, coats, vests, and other garments. I am aware that rivets have been used for securing seams in shoes, as shown in the patent to Geo. Houghton, No. 64,015, April 23, 1867, and to L. K. Washburn, No. 123,313, January 3, 1872; and hence I do not claim, broadly, fastening of seams by means of rivets." The claim is as follows: "As a new article of manufacture, pantaloons or other garments having their pocket openings secured at the edges by means of rivets or their equivalent, substantially in the manner described and shown."

This case has been contested with great vigor. The bill was filed in November, 1876. Testimony was taken from May, 1877, to July, 1878. The plaintiffs examined 283 witnesses, and the defendants 145. The plaintiffs' proofs cover 2465 printed pages, and the defendants' 1196. The plaintiffs' brief covers 323 printed pages, and the defendants' 152. Infringement is not contested, but the defendants rely on want of patentability and want of novelty in the thing patented.

On the point that there is no invention in the thing patented, the defendants contend that the want of patentability consists in the fact that the invention is nothing more than the employment, at the corners of a pocket opening, of the old and well-known rivet; and that no new function is performed by the rivet in that place from what is performed by it in any other place. The invention is claimed as an improvement in the pocket opening of a garment which has a pocket opening. It does not extend to anything but a pocket opening. It requires that the seam which unites two pieces of

cloth laterally shall terminate at the commencement of the pocket opening; that such seam shall be made by means of sewing the two pieces of cloth together laterally by thread; that the rivet shall be of metal; that it shall be placed in the seam, at the edge of the pocket opening—that is, where the seam ends and the pocket opening begins, but still in the seam; that it shall be so located and fastened, with reference to the two lateral pieces of cloth which the seam unites, as to bind together such two lateral pieces of cloth by pressing tightly upon both of them; that this shall be effected by putting the rivet through a hole, and heading it down on both of the two opposite faces where the hole begins and ends; that the operation of the rivet, when so set, shall be to receive the strain which results from pressure from within on the edge or end of the pocket opening, and keep such strain from coming on the thread of the seam, and thus protect such thread from ripping or starting and allowing the seam to open; and that the practical advantage of the arrangement shall be to get rid of the frequent renewal, by sewing, of the thread in the seam at the edge of the opening. In view of the testimony as to the state of the art prior to the invention of Davis, all the foregoing features are involved in such invention. They all appear on the face of the specification of the patent, and are embraced in the claim. They amount to invention, and they embody patentability. The result of them was new and useful. The case is not one of mere double use, or of the use of an old rivet in a new place. It is not merely the usual through-and-through binding or uniting function of the rivet that is availed of.

It is argued, for the defendants, that there is no combination between the rivet and the sewed seam, but a mere aggregation; that the claim is not confined to the application of a rivet to a sewed seam; that a stay of sewed thread is the equivalent of a rivet; that in view of the prior use of a stay of sewed thread at the corner of a pocket opening, there was no invention in the change to a metal rivet; and that a button had before been sewed on with thread at the upper end of the seam, at the edge of the pocket opening, to prevent the thread of the seam from being worn away, and the seam had been stayed by sewing in leather or other fabric, and there was no invention in passing from these arrangements to Davis's. It is sufficient to say that there is no force in any of these suggestions as against the validity of the patent. Nor is it shown that the invention, as before defined, was known or in use before it was made by Davis.

The defendants, to defeat the patent on the ground of want of novelty, must make out the defense by satisfactory and preponderating proof. This they have not done. In coming to this conclusion, I have considered the Magee coat, the Nightingale coat, the evidence grouped in the defendants' brief under the heads "Nevada C" and "Nevada D," the evidence of Stanton, Ford, Wilson, Richville, and Hogbin, the Orr overalls, the patent to Bowker, and the patent to Bellford.

There must be the usual decree for the plaintiffs.

April 29, 1880.

DECREE.

This cause having heretofore been brought to a hearing, on the pleadings and proofs therein, and having been argued by Milton A. Wheaton and George Gifford for complainants, and Gilbert M. Plympton and Augustus Prentice for defendants, and due deliberation had thereon:

It is, on motion of George Gifford for said complainants, ordered, adjudged, and decreed as follows:

That the reissue Letters Patent, No. 6335, granted and issued on the 16th day of March, 1875, to the complainants, are good and valid.

That the said complainant, Jacob W. Davis, was the first and original inventor and discoverer of the improvement in pantaloons and other garments, as described and claimed in the said Letters Patent, and that the complainants are the exclusive owners of said Letters Patent.

That the said Henry W. King, E. W. Dewey, and William C. Browning, defendants herein, have infringed upon the said Letters Patent, and upon the exclusive rights of the complainants under the same.

And it is further ordered, adjudged, and decreed that the complainants do recover of the defendants the profits, gains, and advantages which they, the said defendants, or any of them, have received or made, or which have arisen or accrued to them, or any of them, from the said infringement since the 16th day of March, 1875; and also that the complainants recover from the defendants the damages sustained by them by reason of said infringement.

And it is further ordered, adjudged, and decreed that the said complainants do recover of the defendants their costs and charges and disbursements in this suit to be taxed.

And it is further ordered, adjudged, and decreed that it be referred to Stephen D. Law, Esq., as a Master of this Court, *pro hac vice*, to ascertain and take and state and report to the Court an account of the said profits, gains, and advantages, and also the amount of damages sustained by said complainants from said infringement.

And it is further ordered, adjudged, and decreed that the complainants, on such accounting, have the right to cause an examination of the said defendants, *ore tenus* or otherwise, and also the production of the books, vouchers, and documents of the said defendants, and that the said defendants attend for such purpose before said Master from time to time as said Master shall direct.

And it is also further ordered, adjudged, and decreed that a perpetual injunction be issued in this suit against the said defendants, restraining them and each of them, and their and each of their agents, clerks, servants, attorneys, and workmen, and all claiming and holding under or through them, from making, or selling, or using, or in any manner disposing of any garments embracing the invention or improvement claimed in the said Letters Patent, pursuant to the prayer of the bill of complaint.

SAM'L BLATCHFORD.

INJUNCTION.

UNITED STATES OF AMERICA.

Circuit Court of the United States for the Southern District of New York.

IN EQUITY.

The President of the United States of America, to Henry W. King, E. W. Dewey, and William C. Browning, their and each of their servants, agents, attorneys, employees, workmen, and confederates, and each and every of them—greeting:

Whereas, it hath lately been represented to us in our said Circuit Court of the United States, sitting as a court of equity on the part of Levi Strauss, Louis Strauss, Jonas Strauss, William Sahlein, and Jacob W. Davis, the complainants, that they, the said complainants, have lately exhibited their bill of complaint against you, the said Henry

W. King, E. W. Dewey, and William C. Browning, defendants, to be relieved touching the matters therein contained, in which bill it is, among other things, set forth that reissue Letters Patent were granted and issued by the United States to the complainants for new and useful inventions in pantaloons and other garments, dated the 16th day of March, 1875, and numbered 6335. And that said complainants have become and now are proprietors of said patent. And it being also set forth in said bill that you, the defendants, have made, used, and vended to others to be used and sold, and that you are now making, using, and vending to others to be used and sold, pantaloons and other garments containing, using, and employing the above mentioned improvements, and substantial and material parts thereof, and which are an infringement upon said patent, and that your actions and doings are contrary to equity and good conscience.

We therefore, in consideration of the premises, and the same appearing to us to be true, do strictly and fully command and perpetually enjoin you, the said Henry W. King, E. W. Dewey, and William C. Browning, the defendants, and your and each of your servants, agents, attorneys, workmen, employees, and confederates, and each and every of you, under the penalty that may fall thereon, that you and each and every of you do henceforth altogether, absolutely, and entirely desist and refrain from, directly or indirectly, making, constructing, using, vending, delivering, working, or putting into practice, operation, or use, or in any wise counterfeiting or imitating the said inventions and improvements, or any of them, or any part thereof, or any pantaloons or other garments containing, using, or employing said inventions and improvements, or any part thereof, or made in accordance therewith, or like or similar to those which you or any of you have heretofore made, used, or sold, or caused to be made, used, or sold, in infringement of said patent, and from in any way infringing said patent, or the rights of the complainants under the same.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of New York, in said district, this 7th day of May, in the year one thousand eight hundred and eighty.

[L. S.] JOHN I. DAVENPORT,
Clerk of the Circuit Court of the United States
for the Southern District of New York.

George Gifford, solicitor and counsel for complainants.

Abstract of Recent Decisions.

OREGON SUPREME COURT.

ORAL EVIDENCE. While it is admitted to be the general rule that oral evidence is not admissible to explain or vary the words of a written instrument, there are exceptions and modifications of the rule where the free operation and construction of the written instrument are concerned.—*Moreland* vs. *Brady*, March 8, 1880.

WILL—ERROR OF DESCRIPTION. "*Falsa demonstratie non nocet*" has become a thoroughly established maxim of the law, the practicable meaning of which is that, however many errors there may be in the description, either of the legatee or of the subject matter of the devise, it will not avoid the bequest, provided enough remains to show with reasonable certainty the intent of the devisor. Extraneous oral evidence is clearly admissible to show the state and extent of the testator's property at the time the will was executed, in order that the Court may be placed in the position of the testator at that time, and be able to read the will in the light of surrounding circumstances.—*Id.*

SAME. Where the devise of B. bequeathed "to Margaret McGill a certain parcel of ground or lots in the city of Portland, numbered block 187, lot No. 2," and also, "to his sister, Esther Brady, that lot or parcel of ground in the city of Portland, described as lot No 1, in block 187," and it appears that the testator, at the time said will was executed, had no such lots as one and two in block 187, but did own lots three and four in said block, that part of the description may be treated as erroneous and be rejected, and the remaining description will be sufficient to identify the property with reasonable certainty.—*Id.*

POWER OF ATTORNEY. Where a married woman owns land in this State in her own right, and she and her husband reside out of the State, they may join in the execution of a power of attorney investing another with power to convey any interest she may have in such real estate.—*Id.*

CUSTODY OF CHILD. In a suit to dissolve the marriage contract by a husband against his wife, where the Court granted a divorce on account of the adultery of the wife, and also decreed that the custody of an only child of the parties, a boy between three and four years of age, should be given to its natural grandfather, with whom the divorced wife resided: *Held*, that this was erroneous, and that the father of the child having the means to provide for its maintenance and support, and otherwise a proper person to care for it, and being the party not in fault in the divorce suit, was entitled to the care and custody of the child in preference to its grandfather.—*Jackson* vs. *Jackson*, March 8, 1880.

Legal Facetiæ.

A GOOD STORY OF JUDGE CLEARY OF KENTUCKY.—Some years ago I had a case to argue before the eccentric Judge Cleary of Kentucky. While waiting for my case to come up, I listened to the trial of a brawny ruffian who was accused of stealing two mules. He had been caught riding one and leading the other; and though both animals bore their real owner's brands, he swore that they had been foaled on his farm and raised by him. Every point of evidence was against him, but he swore he was innocent with oaths enough to scare an overland teamster. The jury rendered a verdict of guilty without leaving their seats. Judge Cleary asked him:

"Have you any thing to say why judgment should not be pronounced on you?"

"Yes, I have!"

"What is it?"

"I am innocent, and I hope God may strike me dead if I am not!"

The Judge paused a moment. Then he said quietly:

"As the Almighty has not seen proper to comply with your request, the sentence of this Court is—" and he went on to pronounce it.

IN one of our Western towns, several years since, Judge B. was presiding during the trial of a murder case, and Colonel C. was defending the accused. (Both Judge and counsel have since been in Congress. The Judge was a large man with a very small voice, and Colonel C. a fine talker with a rich Irish brogue.) The court room was on the second floor of a frame building, and packed to its utmost capacity by the friends and foes of the defendant. The testimony was all in, the District Attorney had delivered his opening argument, and Colonel C. had criticised the effort of the prosecution, commented upon the witnesses and their testimony, produced his authorities, and was at the very climax of his final appeal to the jury, several of whom were in tears, when the Judge's piping voice broke in upon the orator with "Mr. C., I say"—"I beg the Court's pardon if I have offended your Honor, or infringed the rules of this Honorable Court"—"But, Mr. C.,"—"I beg your Honor's pardon if I have"—"But, Mr. C. (in a piercing screech), don't you see the bottom is falling out of this d——d chebang?" (The floor had sagged down about a foot at one side.) A panic ensued, the court-room was vacated pell-mell, the prisonor among the affrighted crowd, and effected his escape.

Colonel C. remarked that "the bottom's falling out of the d——d chebang" took the bottom out of the government's case, and saved the expense of hanging his client.

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Current Topics.

WE said in our issue of April 17th: "The 'general law' for the incorporation, etc., of cities and counties of one hundred thousand inhabitants, better known as the 'McClure Charter,' is in the hands of the Governor for his signature. *It is so flagrantly violative of the Constitution* that we think the chief executive *must* refuse to sign it." The recent decision of the Supreme Court declaring said law unconstitutional and inoperative confirms the views then expressed by us. The opinion will be published next week.

THE complaint in *Leonis* vs. *Lazzarovich*, reported in this issue of the JOURNAL, alleged that an error was committed in the description of the property conveyed by the defendant, who was a married woman, and that the error consisted in excepting from the operation of the deed certain real property which should not have been so excepted, and prayed for a reformation. The Court held that the deed of a married woman could not be reformed. This principle is not new, being among the general principles of the common law respecting the rights and powers of married women, but it is the first time it has been considered in connection with the rights and powers of married women under our codes. It is therefore an important case, and we should not fail to call attention to it.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed June 10, 1880.]

[No. 5911.]

PAGE, RESPONDENT, vs. WILLIAMS, APPELLANT.

PRACTICE—DISCRETION OF COURT. Where the defense to an action upon a promissory note is payment, it is not an abuse of discretion for the Court to refuse the filing of an amended answer setting up want of consideration, the cause having been at issue more than two years.

INTEREST—WHEN COMPOUNDED. Where a promissory note contains the following clause, "with interest at two per cent. per month, interest payable monthly, and if not paid to become part of the principal," the interest is to be compounded monthly.

Appeal from the District Court of the Third Judicial District, San Francisco County.

G. F. & W. H. Sharp, for respondent.
Joseph M. Nougues, for appellant.

MYRICK, J., delivered the opinion of the Court:

This is an action upon two promissory notes, one for $5,000 currency, and the other for $14,000 gold. Each note contained the following clause: "With interest at two per cent. per month, interest payable monthly, and if not paid to become part of the principal."

The complaint was filed May 8, 1873. The answer was filed August 11, 1873, and the defense was payment. The case came on for trial before a jury July 22, 1875. After the plaintiff had rested her case, and the defendant had given some evidence, the defendant offered to show that the notes in question were without consideration; and upon the Court refusing to hear such proof under the pleadings, defendant asked leave to file an amended answer, alleging want of consideration. The Court refused to permit the defendant to amend, on the ground that the case had been at issue nearly two years, and the trial had already commenced, and new issues would be tendered by the amendment. In our opinion the Court properly exercised its discretion in refusing to allow this amendment.

During the trial it appeared that the parties had had many transactions, and plaintiff had held several notes of defendant—among others, three held by her in August, 1872, besides those in suit—and as security defendant had transferred to her three notes of $5,000 each, made by the Bay

View Homestead Association. The amount of the notes of the association had been collected by plaintiff, and on the trial it became a question whether the amount so collected should be applied on the notes in suit, or on other notes of defendant formerly held by plaintiff, but which had been surrendered by plaintiff to defendant as paid before this action was commenced; and defendant offered to prove that the notes in suit were given without consideration in this, that the amount received from the association, and other payments made by defendant to plaintiff, would equal all indebtedness of defendant to plaintiff.

The Court declined, under the pleadings, to let the evidence go to the jury to show want of consideration, holding that payment of the notes in suit was the only issue tendered by the answer; but the Court admitted all evidence offered upon the plea of payment. There was evidence on the part of plaintiff tending to prove that, by agreement between the parties, the $15,000 received on the notes of the association was applied to the payment of the three other notes, and those notes surrendered to defendant, leaving the notes in suit to be in force, which evidence was denied by defendant. The evidence was submitted to the jury under the instruction that if defendant directed the application of the $15,000 to be made upon the notes in suit, he had the right so to do, and credit should be made accordingly; on the contrary, if they found the fact to be that defendant gave no such direction, but by agreement between them the money was applied to the payment of other notes surrendered by her to defendant, they had no right to credit the money on the notes in suit.

The Court below instructed the jury that the notes in suit were to bear interest at the rate of two per cent. per month, compounded monthly—that is, at the end of each month interest at the rate of two per cent. per month was to be added to the principal, and the sum thus made was a new principal, to bear interest at the same rate, and so on, adding the interest each month to the principal. The defendant contended that because the notes do not contain a provision in terms that the interest was to compound monthly, the principal only was to bear interest at two per cent. per month, and all accumulations of interest, not being part of the principal, bore no rate of interest by agreement in writing, but being due each month, bore the statutory rate of interest only.

From an examination of the transcript it appears to us that the main controversy between the parties has arisen

with reference to the computation of interest, as well upon the notes in suit as upon the other notes formerly held by plaintiff. The evidence on the part of plaintiff tended to prove that the total amounts received by plaintiff of defendant (including the $15,000) equaled the amounts of the prior notes, according to her method of computing interest, and paid the interest on the notes in suit to September 1, 1872, and that on that day the parties had a settlement, and the prior notes were surrendered, and the interest credited on the notes in suit. The verdict of the jury was upon this basis, notwithstanding the conflicting evidence of defendant.

We are of the opinion that the instruction given by the Court below was correct, and that the interest was to be compounded monthly. We see no error in the record.

Judgment and order affirmed.

We concur: Sharpstein J., Thornton, J.

DEPARTMENT No. 2.

[Filed June 4, 1880.]

[No. 7024.]

MIGUEL LEONIS, RESPONDENT,

VS.

JUANA LOPEZ DE W. DE LAZZAROVICH, APPELLANT.

MARRIED WOMAN—REFORMATION OF DEED. A court of equity cannot reform the deed of a married woman.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Howard, Brousseau & Howard, for respondent.
Glassell, Smith & Smith, for appellant.

MORRISON, C. J., delivered the opinion of the Court:

This action is brought to correct an alleged mistake in a deed executed by appellant and her husband to certain lands situate in the county of Los Angeles. The foundation of the complaint is, that other lands, in addition to those described in the deed, were meant and intended to be included therein, but were, by mutual mistake, omitted. It is in the exception clause in the deed that the mistake is said to have occurred. The language of the deed is: "Excepting from the operation of this conveyance all those lots of land contained in Blocks X and Y of the Mount Pleasant tract, a description

of which tract is contained in a map made by Moore & Kelleher of said tract, and recorded in the County Recorder's office."

This is claimed to be a mistake, and instead thereof the exception should have been as follows: "Excepting from the operation of this conveyance all those lots of land contained in Block X and Block Y of the Mount Pleasant tract, which had been already sold and conveyed by the parties of the first part hereto before the execution by them of a certain mortgage of said lots to the party of the second part hereto, dated June 19, 1876, and recorded in the Los Angeles County Records, Book 19 of Mortgages, page 389, a description of which tract is contained in a map made by Moor & Kelleher, of said Mount Pleasant tract, and recorded in the Los Angeles County Recorder's Office, in the miscellaneous records."

On the trial in the Court below, several witnesses were examined on behalf of the plaintiff for the purpose of proving the mistake in the deed, and about an equal number testified on behalf of the defendant to the effect that there was no such mistake. The defendant, by her counsel, objected to the introduction of any evidence in the case tending to prove that there was a mistake in the deed, and reserved her exception to the ruling of the Court admitting such evidence. The Court entered a decree reforming the deed in accordance with the prayer of the complaint.

In view of the substantial conflict in the evidence, it may be seriously doubted whether such a case was made as would justify the Court below in finding that the alleged mistake really existed; for the rule in cases of this character is, that "the evidence must be clear and convincing, making out the mistake to the entire satisfaction of the Court; and not loose, equivocal, or *contradictory*, leaving the mistake open to doubt." (*Lestrador* vs. *Barth*, 19 Cal. 660; Story's Equity Jurisprudence, sec. 152.)

We say it may well be doubted whether the evidence in the case was sufficiently clear, convincing, and free from doubt as to justify a court of equity in decreeing a reformation of the instrument; for we have the admission of plaintiff's counsel, made during the progress of the trial, *that plaintiff did not claim anything in Block Y*; and also the evidence of Judge King, the notary who took the acknowledgment, that defendant, after the deed had been read to her in English and Spanish, positively refused to sign it until the exception clause was incorporated in it.

But we do not deem it necessary to rest this opinion on

the ground that the decision of the Court below was not sustained by the evidence. There is another question in the case which, in our opinion, is conclusive of the rights of the parties to this suit.

The defendant is a married woman, and it is a conveyance made by a *femme couverte* which is sought to be reformed. It is claimed by the respondent that it does not affirmatively appear that the defendant is a married woman; but that fact is sufficiently apparent, not only in the pleadings, but in the evidence. The deed executed by the defendant is attached to the complaint and made a part thereof, and the defendant is therein stated to be a married woman. The certificate of acknowledgment described her as a married woman, and in the evidence she is spoken of as the wife of John Lazzarovich. The question here arises, can a court of equity reform the deed of a married woman? Was it within the equitable powers and jurisdiction of the Court below to decree, as it did, that the defendant should, within a certain time fixed by the decree, execute to the plaintiff her deed conveying lands not described *in any deed or other written instrument*, and, in case she made default, that such deed should be executed by the Clerk of the Court. This is what the Court did by its decree, and it is the correctness of such proceeding that we are now called upon to review.

Whatever rights and powers a married woman has or can legally exercise in the disposition of her property, are matters of statutory regulation. At common law she possessed no power to convey her lands, except by fine and recovery, and that law constitutes the basis of our jurisprudence; and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statute. (*Van Maren* vs. *Johnson*, 15 Cal. 308; *Dow* vs. *Gould & Curry Silver Mining Co.*, 31 Cal. 640.

"The conveyance of a *femme couverte*, except by some matter of record, was absolutely void at law; and in England the wife used to pass her freehold estate by a fine, and this and a common law recovery were the only ways in which she could at common law convey her real estate." (2 Kent's Commentaries, 151.) And although she is now permitted by statute to convey by deed, her agreement, with the consent of her husband, for a sale of her real estate, is absolutely void at law; and courts of equity never enforce such a contract against her. (2 Kent's Commentaries, 169; *Wooder et al.* vs. *Morris and wife*, 2 Green, 65; *Watrous* vs. *Chalker*, 7 Conn. 223; *Butler et al.* vs. *Buckingham*, 5th day, 492.) In the case last referred to, a *femme couverte*, with the consent and

approbation of her husband, agreed to sell a lot of land for a valuable consideration; and the consideration paid was appropriated to her separate use. The intended purchasers entered on the land, erected a house and store thereon, and were in the possession for twenty years; and under all these circumstances the Court held the agreement of the *femme couverte* void, and that chancery could give no relief. This case was cited by the Court with approbation in the more recent case of *Watrous* vs. *Chalker*, 7 Conn. 227.

Let us, then, inquire how far the rights and powers of married women in this respect have been modified by statute. Section 162 of the Civil Code declares that "all property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, is her separate property, which she may convey without the consent of her husband." By Chapter II of the same Code the transfer of real property by the wife is regulated. Section 1093 provides that "no estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her unless the grant or instrument is acknowledged in the manner prescribed by sections 1186 and 1191."

"Section 1186. The acknowledgment of a married woman to an instrument purporting to be executed by her must not be taken unless she is made acquainted by the officer with the contents of the instrument on an examination without the hearing of her husband; nor certified unless she thereupon acknowledged to the officer that she executed the instrument, and that she does not wish to retract such execution." And section 1191 prescribes the form of the certificate of acknowledgement in such cases.

The certificate is absolutely essential to the deed, and is a material part thereof. The case of *Mariner* vs. *Saunders*, 5 Gilman, 125, is an instructive one on this subject. The Court there says: "By the eleventh section of an Act of the Territorial Legislature, passed September 17, 1807, and by an amendment thereto passed in 1813, the manner, and before whom a deed purporting to convey the estate of the wife shall be acknowledged by her, is prescribed; and deeds thus acknowledged and certified are declared to be good and effectual as if the wife were *sole*. These statutes were in force at the time this deed purports to have been executed, and there is no pretense that there was any such certificate of acknowledgment as the law required. Without such acknowledgment the deed was *absolutely void, and had no more vitality than a piece of blank paper*. Only by virtue of such acknowledgment certificate could the deed become operative,

Its execution could be proved in no other possible way, and in no other way could she convey. The certificate of acknowledgment of a deed from a *femme couverte* to convey her own lands is as much an essential part of the execution of the deed as her seal or signature, and without it the law presumes that it was obtained by fraud or coercion. This deed then was void as to the wife." And in the case of *Mason* vs. *Brock*, 12 Illinois, 276, the same Court says: "A married woman can only be divested of her real estate in the mode prescribed by statute." This brings us to the decisions of our own State, where we find the same doctrine enunciated.

In *Morrison* vs. *Wilson*, 13 Cal. 498, the Court says: "The general rule is, that if the conveyance of a *femme couverte* be not executed according to the forms prescribed by the statute, it is not valid; and accordingly it has often been held that when the certificate of acknowledgment was defective in any substantial particular, the *femme's* title did not pass. It would be strange if a mere defect of this kind avoided the deed, though regularly signed, and proven to have been fairly and voluntarily made; and yet a loose declaration of the *femme* in the presence of her husband, and possibly made by his connivance or constraint, and in total ignorance by the wife of its legal effect, or even of the real facts of the transaction, could pass her estate. * * * It is true that it is said by some writers that fraud vitiates all contracts, even those made by infants or *femmes;* but we apprehend that in cases of married women, under statutes like ours, this doctrine is limited to this, that a contract so infected cannot be enforced, but not that a fraudulent representation will divest a *femme's* title in the face of a statute declaring a *different and exclusive mode of divestiture.* * * But if we hold that a *femme couverte* cannot be divested of a title by *parol* or an *estoppel in pais*, directly operating upon the title, it would be illogical to hold that such divestiture could be affected by an *estoppel* created by taking possession under a bad title." In *Maclay* vs. *Love et al.*, 25 Cal. 374, the Court says "that the wife has the power to create a charge upon her property, but she has no power to create it in any other mode than the one prescribed by the express provisions of the statute." To the same effect are the cases of *Ewald* vs. *Corbett*, 32 Cal. 493; *McLerun* vs. *Benton*, 43 Cal. 467, and *Terry* vs. *Hammond*, 47 Cal. 32.

The case of *Barrett* vs. *Tewsbury et al.*, 9 Cal. 13, was a suit in equity to correct an insufficient acknowledgment to a deed of a married woman, and it is there said: "The deed not being properly acknowledged is insufficient. It is not in

the power of a court of equity to compel a married woman to correct an insufficient acknowledgment. Her consent must be perfectly free. She can make no contract to bind her, except in the manner prescribed by the law. The provisions of the statute must be strictly pursued. She must be examined separate and apart from her husband."

The case of *Mariner* vs. *Saunders*, 5 Gilman, 125, holds that the certificate of acknowledgment of a married woman is an essential part of the execution of the deed, just as much so as the signature or seal; and if it cannot be reformed, what other essential part of the deed can be reformed?

We are aware that some changes have been made in the Code since the foregoing California cases were decided; but these do not affect the question now under consideration. It is true that the wife can now, under section 162 of the Civil Code, convey her separate property without the consent of her husband, and that either husband or wife may, under section 158 of the same Code, enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried. Yet when it comes to the disposition or conveyance of the real property of the wife, the mode is prescribed by the statute, and that mode must be pursued.

In addition to other sections of the Code referred to above, which apply to and regulate conveyances by married women, there is section 1187 of the Civil Code, which contains the following provision: "A conveyance by a married woman has the same effect as if she were unmarried, and may be acknowledged in the same manner, except as mentioned in the last section; but such conveyance has no validity until so acknowledged."

We have thus seen that there is but one mode by which a married woman can convey her separate estate, and that is prescribed by statute. All the cases hold that the provisions of the statute must be substantially complied with; and if the certificate of acknowledgment is insufficient, the conveyance is absolutely void.

But in the case now in hand there was no conveyance whatever of the land in controversy. The description in the deed does not embrace it, and it is sought to prove a *parol* agreement on the part of the wife to convey this particular tract of land. A *femme couverte* can only be bound by a written instrument, executed and acknowledged by her in the manner prescribed by law; and it is not competent for a court of equity to supply defects in description any more than it can reform a certificate of acknowledgment. That

the latter cannot be done has been expressly decided in the case of *Barrett* vs. *Tewksbury et al.*; and that the former cannot be done is equally clear upon principle and authority.

Judgment reversed and cause remanded, with instructions to render judgment for defendant, the appellant.

I concur: Myrick, J.

I concur in the judgment: Thornton, J.

DEPARTMENT No. 1.

[From the Bench, May 18, 1880.]

[No. 6744.]

CARR, APPELLANT,

vs.

THE CENTRAL PACIFIC RAILROAD COMPANY, RESPONDENT.

GRANT OF TIMBER LAND.

Appeal from the District Court of the Fourteenth Judicial District, Placer County.

Myers & Bullock, for appellant.

Hall & Craig, for respondent.

Counsel for appellant—There is but one question to be decided in this case, and that is: Who is entitled to the timber upon this land? Plaintiff claims it by virtue of his patent, found on folios 12 to 18 of this transcript, issued December 9, 1873. There are five reservations in this patent, and there is no reservation of timber at all. The defendants claim that they are entitled to the timber under the Act of Congress of 1862. (Reads Act.) It is under that that the railroad company claims the timber.

Mr. Justice McKinstry (presiding)—The words of the grant are very broad. We all think that this judgment will have to be affirmed. The language seems to be about as broad as it can be—that "the timber thereon is hereby granted." The only possible doubt would be as to whether "timber" included all trees and wood.

Counsel for respondent—There is no controversy as to that, I understand.

Mr. Justice McKinstry—Judgment affirmed.

DEPARTMENT No. 1.

[Filed June 11, 1880.]

[No. 6404.]

PARKS, APPELLANT, vs. BARNEY, RESPONDENT.

FRAUDULENT TRANSFER—CHANGE OF POSSESSION. The question of fraud in a sale of personal property, or that there was in fact no delivery or no actual or continued change of possession, is one for the jury, or a court sitting without a jury, to determine. The court cannot say, as a *matter of law* in view of certain testimony, that the transaction is fraudulent.

Appeal from the District Court of the Sixth Judicial District, Yolo County.

Lambert & De Witt and *J. C. Ball*, for appellant.

C. P. Sprague, *W. B. Treadwell*, and *R. P. Davidson*, for respondent.

Ross, J., delivered the opinion of the Court:

This is an action to recover twenty head of horses, or the sum of one thousand dollars, their value. The defendant is the Sheriff of Yolo County, and took the property on the 10th of August, 1877, under and by virtue of an execution against one Lambert and in favor of one Asberry. The plaintiff claimed title under an alleged sale from Lambert to him on the 23d of July, 1877, which sale was claimed by the defendant to be void for want of an immediate delivery or any actual or continued change of possession.

On the trial, evidence was introduced tending to show this state of facts: Lambert, the former owner of the horses, was the owner of a farm in Yolo County, on which the horses were kept. Up to the 10th of May, 1877, he was living on the farm, and one Grum was working for him. About that time Lambert left the ranch, and did not live there afterwards; but he and his sons continued to go there occasionally to look after the stock. Grum continued to make the ranch his headquarters, although he was absent from time to time. He testified at the trial that he did not work for Lambert after May 10th. The plaintiff, who resides in Napa County, testified that he went to Woodland, in Yolo County, on the 22d of July, 1877, and purchased the horses from Lambert the next day, July 23d, for $1,000, which he paid him; that they made the trade in the town of Woodland, and Lambert was to deliver him the horses at a butcher's corral, to which place Grum had on the same day, by direction of Lambert, driven them from the ranch—the corral being about a mile

or mile and a half from both the town and the ranch; that he and Lambert went to the corral, and there the latter, in the presence of Grum and De Witt, an attorney, delivered him the horses, together with a bill of sale, for which the witness paid him a thousand dollars in gold coin; and that he, plaintiff, then employed Grum to pasture the horses for him at the rate of $2.50 a head per month on Lambert's ranch, a lease of which Grum had on the same day taken from Lambert. Grum testified that he received the horses at the corral from plaintiff for the purpose of pasturage upon the terms stated, and that he on the same day drove them back to the ranch, where he kept them for plaintiff until the 10th of August, on which day they were levied on by defendant. It also appeared from the plaintiff's testimony that the money with which he made the purchase was borrowed by him after his arrival in Woodland from one Viers, a son-in-law of Lambert, and that plaintiff did not go to look at the horses before agreeing to purchase them. It appeared, however, that he knew the horses, having at one time kept them on his own ranch in Napa County. The case was tried in the Court below with a jury, and at the close of the testimony the Court, at the request of the defendant, instructed the jury as follows: "The jury are instructed that in this case the evidence shows that there was no immediate delivery of the property in controversy, nor any actual and continued change of possession of the same, under the alleged sale from Lambert to the plaintiff. You will therefore find a verdict for the defendant." The instruction was duly excepted to. The jury retired, and after deliberation were unable to agree. Returning into court, they inquired whether they were bound to find and return a verdict as directed in the said instruction; and being informed that they must obey the instruction as given them by the Court, and that if they refused to do so, they would be in contempt of court and subject to a fine, they returned a verdict for the defendant.

The instruction was clearly erroneous. If it was true that at the time of the alleged sale, and prior thereto, Grum was not in the employ of Lambert, and that the latter had in good faith leased the ranch to Grum, and that the plaintiff in good faith bought the horses from Lambert, the delivery of the horses at the corral, and the subsequent employ of Grum by plaintiff to pasture them, and Grum's actual possession of them for that purpose, would have been such evidence of a delivery and actual and continued change of possession as might have justified the jury in finding a verdict for the plaintiff. The truth or falsity of the testimony and the *bona*

fides of the transaction were questions for them to pass upon. The circumstances appearing in this case might perhaps have been sufficient to justify the jury, or the Court if it had been sitting as a jury, to find *from the evidence* that there was fraud in the transaction, or that there was in fact no delivery or no actual or continued change of possession. But the Court could not, in view of the testimony, say as a *matter of law* that the verdict must be for the defendant.

The appeal from the judgment having been taken too late, must be dismissed.

Appeal from judgment dismissed. Order denying a new trial reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed June 7, 1880.]

[No. 10,496.]

PEOPLE, RESPONDENT, vs. HODGDON, APPELLANT.

RIGHT OF PARTY TO BE HEARD. A party has the right to be heard upon a bill which has been settled and allowed as correct by the Judge who heard and ruled upon the motion for a new trial, even though he be not the Judge who presided at the trial of the case.

DYING DECLARATIONS—ADMISSIBILITY. It is essential to the admissibility of dying declarations that they be made under a sense of impending death.

RIGHT TO SHOW WHY DEFENDANT DID NOT RETURN. After the prosecution had shown that the deceased was ill, and that the defendant had been attending her as her physician, and had promised to return, the defendant had a right to show *why* she did not return.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

Attorney-General, for respondent.
Alexander Campbell, for appellant.

Ross, J., delivered the opinion of the Court:

The defendant was indicted for the crime of murder, committed upon the person of one Emma C. Downs. A trial was had in the late District Court of the Fourth Judicial District in and for the city and county of San Francisco, while the Hon. Robert F. Morrison was the presiding Judge of said Court, which trial resulted in the rendition of a verdict on the 14th day of October, 1879, finding the defendant guilty of murder in the second degree. Subsequently Judge Morrison resigned his position as Judge of said Court, and the Hon. O. P. Evans was appointed in his stead. A motion for a new trial was duly made in said cause on behalf of the

defendant, which motion came on for hearing before Judge Evans on the 29th day of December, 1879. The motion was denied, and judgment was thereupon entered against the defendant. Thereafter the defendant prepared and served upon the District Attorney a bill of exceptions, which bill was, on the 25th day of February, 1880, settled and allowed by the last named Judge in words and figures following: "The foregoing bill of exceptions, prepared by the attorney for the defendant, was presented to the District Attorney; and he having failed to suggest any amendments thereto, but on the contrary having informed me that the same is a true bill, now therefore I, Oliver P. Evans, the Judge before whom the motion for a new trial was heard in said cause, do hereby settle, certify, and allow the foregoing as a correct bill of exceptions. Dated this 25th day of February, 1880. Oliver P. Evans, Judge of the Superior Court of the city and county of San Francisco." The appeal is from the judgment of conviction and from the order refusing a new trial.

It is claimed on behalf of the people that the bill of exceptions cannot be considered here, on the ground that it was not settled by the Judge who tried the cause. The sections of the Code relating to the settlement of bills of exceptions in criminal cases are as follows:

"SECTION 1171. Where a party desires to have the exceptions taken at the trial settled in a bill of exceptions, the draft of the bill must be prepared by him and presented, upon notice of at least two days to the District Attorney, to the Judge for settlement within ten days after the trial of the cause, unless further time is granted by the Judge or by a Justice of the Supreme Court, or within that period the draft must be delivered to the Clerk of the Court for the Judge. When received by the Clerk he must deliver it to the Judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the Judge and filed with the Clerk of the Court."

"SECTION 1172. Exceptions may be taken by either party to a decision of the Court or Judge upon a matter of law—1. In granting or refusing a motion in arrest of judgment. 2. In granting or refusing a motion for a new trial. 3. In making, or refusing to make, an order after judgment affecting the substantial rights of the parties."

"SECTION 1173. Exceptions may be taken by the defendant to a decision of the Court upon a matter of law—1. In refusing to grant a motion for a change of the place of trial. 2. In refusing to postpone the trial on motion of the defendant."

"SECTION 1174. Where a party desires to have the exceptions mentioned in the last two sections settled in a bill of exceptions, the draft of a bill must be prepared by him and presented, upon notice of at least two days to the adverse party, to the Judge for settlement within ten days after the order or ruling complained of is made, unless further time is granted by the Judge or by a Justice of the Supreme Court, or within that period the draft must be delivered to the Clerk of the Court for the Judge. When received by the Clerk he must deliver it to the Judge, or transmit it to him at the earliest period practicable. When settled, the bill must be signed by the Judge and filed with the Clerk of the Court. If the Judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same; the application may be made in the mode and manner and under such regulations as that Court may prescribe, and the bill when proven must be certified by the Chief Justice as correct, and filed with the Clerk of the Court in which the action was tried, and when so filed it has the same force and effect as if settled by the Judge who tried the case. If the Judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in this section, apply to the Supreme Court to prove the same."

The only difficulty in determining the question arises from the concluding clause of the section relating to exceptions taken to an order refusing a new trial: "If the Judge who presided at the trial ceases to hold office before the bill is tendered or settled, he may nevertheless settle such bill, or the party may, as provided in this section, apply to the Supreme Court to prove the same." It does not seem to have occurred to the framers of this clause that the Judge who presided at the trial and the Judge who determined the motion for a new trial might, as here, be different individuals. The first portion of the section, however, provides that where a party desires to have the exceptions taken to an order refusing a new trial settled in a bill of exceptions, "the draft of a bill must be prepared by him and presented, upon notice of at least two days to the adverse party, to the Judge for settlement," etc. The "Judge" here spoken of is manifestly the Judge who should detemine the motion for a new trial. It must be admitted that the section is somewhat ambiguous, but we think we ought not to give it such a construction as would deprive a party of the right to be heard

upon a bill which has been settled and allowed as correct by the Judge who heard and ruled upon the motion, and who was therefore competent to certify to its correctness, and especially when one provision of the section clearly admits of such settlement. The objection to the consideration of the bill will therefore be overruled.

At the trial there was offered by the prosecution, and admitted in evidence by the Court, against the objection and exception of the defendant, a paper purporting to be the dying declaration of the deceased, which paper is in these words:

"Dying statement of Mrs. Emma Downs. Believing I am very near death, and realizing that I may not recover, I wish to make this, my dying statement, as to the cause of my death; and I now, in the presence of these witnesses, charge Mrs. Hodgdon, on Howard Street, between Sixth and Seventh streets, with having been the sole cause of my death in that she did at three several times, and lastly that on yesterday, the 14th day of March, 1878, did use an instrument or implement on my person for the purpose of and producing an abortion, and that she and no other person is to blame in the matter. This being my voluntary statement.

"MRS. EMMA DOWNS.

"Witness: F. B. H. Wing, M. D.; John Wagner, M. D.

"SAN FRANCISCO, March 15, 1878."

There was error in admitting this paper in evidence as the dying declaration of the deceased. It is essential to the admissibility of such declarations that it appear that they were made under a sense of impending death. It is the *impression* of almost immediate dissolution that renders the testimony admissible. "Therefore," says Mr. Greenleaf in his work on Evidence, "where it appears that the deceased at the time of the declaration had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterward, the declaration is inadmissible. On the other hand, a belief that he will not recover is not in itself sufficient, unless there be also the prospect of 'almost immediate dissoluion.'" This is the rule recognized and approved by all of the authorities. The only difficulty that arises comes from the application of the rule to the facts of the particular case. In the case before us, however, we think it appears upon the face of the paper itself that the deceased had not abandoned all hope of recovery; and this cannot be made plainer than by a repetition of the words themselves: "Believing that I am very near death, and realizing that I *may* not recover, I wish to make this my

dying statement," etc. There is here a clear indication that the deceased at the time of making the declaration had not abandoned all hope of recovery. The declaration was therefore inadmissible. (1 Greenleaf on Ev., sec. 158; Wharton's American Law of Homicide, pages 306–7–8; *Rex* vs. *Woodcox*, 2 Leach's Cr. Cases, 267, 566; *People* vs. *Sanchez*, 24 Cal. 24.

In the last case cited this Court said: "This species of testimony should always be received with the greatest caution, and too much care cannot be observed by the Court in scrutinizing the primary facts upon which its admissibility is grounded. No person is entirely exempt from a disposition to excuse and justify his own conduct, or to inflict vengeance upon one at whose hands he has suffered a grievous wrong; and in the eye of the law this proclivity is presumed, in cases like the present, to be overcome and silenced only by the presence of almost immediate death. An undoubting belief existing in the mind of the declarant, at the time the declarations are made, that the finger of death is upon him, is indispensable to that sanction which the law exacts; and if it shall appear in any mode that there was a hope of recovery, however faint it may have been, still lingering in his breast, that sanction is not afforded, and his statement cannot be received."

On the trial, evidence was introduced on behalf of the prosecution tending to show that during the afternoon of the 14th of March, 1878, the deceased, accompanied by one Mrs. Wilkinson, visited the house of the defendant; that deceased went into the parlor of the defendant, and there told her that the operation had failed; that defendant expressed surprise, and then invited deceased to go up stairs with her; that defendant and deceased remained up stairs some fifteen or twenty minutes, when they came down, and Mrs. Wilkinson and the deceased left the house; that deceased looked pale and had a purple spot on one side of her face when she came down stairs; that she vomited twice while on her way home, and immediately after arriving there went to bed, complaining of great pains in the head and in the region of the abdomen; that about 6 o'clock P. M. defendant was sent for and prescribed for the deceased; that deceased was delivered of a fœtus at 12 o'clock on that night; that she continued to get worse, and at 5 o'clock the next morning the deceased sent her husband for the defendant, who again visited and prescribed for the deceased, and on leaving stated that she would return in the afternoon, when she expected to find deceased a great deal better; that when asked whether it

would be better to send for another physician, defendant said she thought it unnecessary, and that when she left she carried the fœtus away with her, and that she never did return to visit the patient.

The defendant in testifying in her own behalf, after denying that she performed the operation with which she was charged, and admitting that at the request of the deceased she had made certain examinations upon her person and prescribed for her, said: "When I left at my last visit I told them I would come back in a short time, and when I went home I told my son that I would like to have him go with me. I told him what I suspected on seeing the fœtus, and asked him if he would go with me in an hour or two, or as soon as he could." In answer to a question by her counsel as to whether or not she went, the defendant replied: "Before I got ready to go Mr. Downs came and told me——" At this point the District Attorney interposed an objection, and the Court ruled that the witness might state that Mr. Downs told her *something* by reason of which she did not go, but refused to permit her to state what it was that Downs told her. To this ruling the defendant reserved an exception, which we think well taken. The prosecution had shown that the deceased was ill, and that the defendant had been attending her as her physician, and that on leaving on the occasion of her last visit defendant had said she would return very soon, but did not return at all. This circumstance, unexplained, might have been considered by the jury as a suspicious circumstance tending to show guilt on defendant's part; and the latter, in order (if she could) to do away with any inference or suspicion to her injury that might have been drawn from her failure to return to her patient under the circumstances appearing, had the right to show *why* she did not return. This she could not fairly do by saying it was because of *something* deceased's husband told her, without showing what that something was.

For the errors committed in the particulars alluded to, the judgment and order must be reversed. It becomes therefore unnecessary to pass upon the other questions presented by the counsel for the defendant.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Thornton, J., McKinstry, J., Sharpstein, J., Myrick, J.

I concur in the judgment: McKee, J.

(Morrison, C. J., took no part in the decision of this cause.)

DEPARTMENT NO. 2.

[Filed June 1, 1880.]

[No. 6689.]

BAKERSFIELD TOWN HALL ASSOCIATION,
RESPONDENT,
VS.
CHESTER, APPELLANT.

INCORPORATION. In a collateral proceeding the question of due incorporation cannot be inquired into. It is sufficient if the corporation claims *in good faith* to be a corporation under the laws of the State, and is doing business as such corporation.

STATUTE OF LIMITATION. Where an association held and possessed realty from 1871 to 1877, claiming to own the same with the knowledge and consent of the holder of the legal title, and not as tenant, the statute is a bar to any defense by the owner of the legal title in an action of ejectment by the association.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

S. P. Colby, *V. A. Gregg*, and *B. Brundage*, for respondent.

Geo. E. Otis, for appellant.

MYRICK, J., delivered the opinion of the Court:

This is an action of ejectment to recover two town lots in the town of Bakersfield. Judgment was rendered for plaintiff, and defendant appealed.

Plaintiff relies upon parol gift from Thomas Baker, and occupation for more than five years. Defendant relies upon title acquired by a deed from Thomas Baker to G. B. Chester, dated October 23, 1869, recorded August, 1870, and from G. B. Chester to Julius Chester (defendant), dated January 3, 1873, recorded January, 1876.

The evidence given by plaintiff tended to prove that in the fall of 1871 several residents of Bakersfield, wishing to erect a hall for public purposes, signed an agreement as follows:

"The undersigned agree to form a joint stock company to build a public hall and Odd Fellows' Lodge in the town of Bakersfield, and will take the number of shares attached to our names in the capital stock, to consist of three hundred shares of $10 each, payable when the entire amount is taken; the company to be formed on the express condition that no assessment shall ever be made on the shares of stock."

Among the signers were Julius Chester, fifty shares;

Thomas Baker, twenty shares; G. B. Chester, five shares; who were also actual promoters of the enterprise. A building committee was appointed, who employed a builder. The understanding was that Thomas Baker was to donate two lots, upon which the building was to be erected; and in that view he went upon and pointed out lots 7 and 8, and had them staked off. The lots were then worth about $25 each. The building was commenced November 9, 1879. Both the Chesters participated in the meetings held, in the collection of subscriptions, and in the sale of materials; both knew that the building was being erected for the purpose and on the lots indicated, and neither made any claim of ownership of the lots.

In the winter of 1872, one of the subscribers objecting to paying his subscription unless the title had passed, Julius Chester said he would get a deed, or have a deed from Baker to the association put on record, when the second story was completed. During all this time it was generally understood that the title was still in Baker. The building was completed in April, 1872, occupying a portion of each lot, and the upper story was at once occupied by Masonic and Odd Fellows' lodges, as tenants of the association; and such occupation continued to the time of trial. The lower story was used as a public hall for public meetings, and was rented by the association for various purposes, such as dramatic troupes, skating rink, shows, lectures, etc., rents being paid to and received by the association.

On the 20th of May, 1872, articles of incorporation were signed by nine persons, including Julius Chester; the name of the corporation to be "Bakersfield Town Hall Association;" the object to be "to own, hold, control, and lease a certain hall situate in said town of Bakersfield." Five trustees were named, one of whom was Julius Chester. The articles were acknowledged May 20, 1872, and on the same day were recorded in the office of the County Recorder, but were not filed in the office of the County Clerk. The association thence continuously occupied the building as above stated, and claimed in good faith to be a corporation under the laws of this State, and did business as such. Defendant was at one time president of the association. Both the Chesters knew of its affairs and business. In the latter part of 1877 defendant entered into and took possession of the lower story of the building, and excluded the association therefrom, and this suit was thereupon brought.

Defendant seeks to have the judgment reversed, and alleges that plaintiff is not a corporation, its articles not hav-

ing been filed in the office of the County Clerk, and that he is the holder of the legal title; and in an action of ejectment the equitable rights of plaintiff, if there be any, cannot be adjudicated.

Section 6 of the Act concerning corporations contained the proviso "that the question of the due incorporation of any company claiming in good faith to be a corporation under the laws of this State, and doing business as such corporation, or of its right to exercise corporate powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party."

This proviso has been referred to in various decisions by this Court—viz., *Rondell* vs. *Fay*, 32 Cal. 354; 26 Cal. 286; *O. & V. R. R. Co.* vs. *Plumas Co.*, 37 Cal. 354. In the latter case the point was distinctly presented, and Mr. Justice Rhodes, delivering the opinion of the Court, uses the following language: "Many of the acts required to be performed in order to make a complete organization of the corporation may have been irregularly performed, or some of them may have been entirely omitted; and the rule of the statute is, that such irregular or defective performance shall not defeat the incorporation when drawn into question collaterally. The omission of the names and number of the first trustees from the articles of association, the failure to file a duplicate of the articles of association with the Secretary of State, * * * insufficient acknowledgment, are irregularities that will not defeat the corporation. A substantial compliance with the requirements of the statute will be sufficient."

See also *S. & L. G. R. Co.* vs. *C. R. R. Co.*, 45 Cal. 680. The Court says: "The plaintiff was a corporation, *de facto* at all events, and as such was in the undisputed possession and control of the road. * * * In this condition of things defendant entered upon the road along Weber Avenue and took it into possession, and now undertakes to defend this action on the ground that the plaintiff was not a corporation *de jure*. * * * We think that, under such circumstances, the title of the plaintiff cannot be inquired into by defendant, who is a mere intruder."

It is sufficient if the company claims in *good faith* to be a corporation under the laws of this State, and is doing business as such corporation. In the case at bar these two essentials clearly appear. The parties signed and acknowledged articles of incorporation, stating the object, name, duration, amount of capital stock, place of business, the number of trustees, and named those to act for the first three months. They attempted to file the articles, but filed

them with the wrong officer. The association took possession of the property, and did the business named in the articles. We think that the question of the due incorporation of the association, or its right to exercise corporate powers, cannot be inquired into in this action. The Court below found that the articles of incorporation were and had been "for several years in the custody of the County Clerk of Kern County, and among the archives of his office." We see no evidence to support this finding, but from the views above expressed it is immaterial whether the finding in that respect were supported or not.

The testimony as above stated tended to show that defendant and his grantors, even if they had the legal title, were not in possession of the premises at any time from November 9, 1871, until the latter part of 1877; on the contrary, that in November, 1871, the parties subsequently incorporating took possession of the premises with the knowledge and consent of Baker, Chester, and Chester, and held the same until May 20, 1872; and that from that day the association exclusively held and possessed the same, claiming to be the owner, with the knowledge and consent of Baker, Chester, and Chester, not as a tenant of them or either of them, and so held and possessed the same until the entry of defendant in the fall of 1877.

The above was especially found by the Court, except that the finding dates the entry of defendant in November, 1876. This gave title to plaintiff, and it was entitled to recover.

Judgment affirmed.

We concur: Thornton, J., Sharpstein, J.

DEPARTMENT No. 1.

[From the Bench May 25, 1880.]

[No. 7105.]

HIS CREDITORS, RESPONDENTS, vs. WELCH, APPELLANT.

CHANGE OF PLACE OF TRIAL.

Appeal from the Superior Court of Butte County.

Dunlap and *Van Fleet*, for respondents.

J. C. Ball, for appellant.

After argument, the Court—This is an appeal from an order denying a motion for a change of the place of trial. The evidence in respect to the residence of defendant was conflicting, and we are not authorized to reverse the finding of the Court below as to the fact.

Order affirmed.

DEPARTMENT NO. 2.

[Filed June 16, 1880.]

[No. 6265.]

IN THE MATTER OF THE ESTATE OF BARTON, DECEASED.

ADMINISTRATION—ATTORNEYS' FEES—COSTS ON APPEAL. One claiming to be the administrator of an estate is not entitled to a credit, upon a settlement, for attorneys' fees and costs paid out by him in the defense of his claim, should it be held that he is not entitled to administer on the estate.

IBID—ADMINISTRATOR'S COMMISSIONS. An outgoing administrator is not entitled to commissions on real estate unadministered. Where an administrator resigns or is removed, leaving the administration incomplete, there is no fixed rule of compensation for the services he has performed. The commissions are to be ascertained when the estate is ready for distribution.

Appeal from the Probate Court, Los Angeles County.

Thompson & Ellis and *W. P. Gardiner*, for appellants.
Thom & Ross, for respondents.

MYRICK, J., delivered the opinion of the Court:

The will of testator omitted to name an executor. There was a contest on the application for letters of administration with the will annexed, between J. E. Griffin, appellant herein, on the one side, and Perdue (one of the devisees) and Rowland on the other. The Probate Court decided in favor of Griffin, and appointed him administrator. Perdue and Rowland appealed from that order, upon which appeal the order of the Probate Court was reversed. Upon the going down of the remittitur, Griffin was removed and Perdue and Rowland were appointed. The matters involved in the present appeal arose during the time Griffin was administrator, and relate to items contained in his account rendered for settlement. In the contest and on the appeal Griffin paid $275 to attorneys for services rendered on his behalf, and $9.20 for printing brief. These items were objected to, and were disallowed by the Court below. We think this ruling was correct. The question involved in the contest and appeal was as to who should administer, and thus receive the commissions. The estate—that is, the creditors and devisees—was not, as such, at all interested. It was a controversy between Griffin on one side, and Perdue and Rowland on the other, and the estate should not bear the expense certainly of the losing party. Whether the other parties will have their expenses paid out of the estate will have to

be determined if they shall present the same in their account. (Leading Cases in Equity, vol. 2, part 1, pp. 548, 552, edition of 1877, and cases therein cited.)

The property of the estate was appraised at—Moneys, $2; real estate, $7,650; and Griffin received for wood $25, and collected on a debt $40.37. He leased the land for the year 1877, and received therefor $950. He also leased the land for the year 1878 for $950, but was removed before the rent became due. He charged commissions on the appraised value of the real estate and on the rental to be received for the year 1878. These items the Court disallowed, but allowed him $100 for the care of the real estate. We do not see how he could have been allowed full commissions on any property that he did not fully administer upon. The real estate still remains unadministered, the rental uncollected. He will probably hereafter be entitled to a proper proportion of the commissions on the value of the real estate; but there is now no rule by which the Court can say that his share of the percentage should be so much, and his successor's share, or their successor's, so much.

The Court, in allowing him $100 for the care of the real estate, was doubtless of opinion that he would in any event be entitled to that sum; but where there is no claim for compensation for extraordinary services, we do not see that an outgoing administrator is legally entitled to any certain, definite share of commissions upon property not yet administered. We cannot say upon how much he shall receive seven per cent., upon how much five per cent., or how much four per cent. In all these matters his successors have a right to be considered. There is but one aggregate sum to be allowed as commissions, and that sum must be properly apportioned by the Court. The Court has no basis upon which to make an apportionment until the close of the estate. At the close of the administration the apportionment can be made.

We are aware that this Court, in *Ord* vs. *Little*, 3 Cal. 289, said that "In such a case it is the duty of the Probate Court to examine into the nature and value of the services rendered, and comparing, as well as possible, that which has been done with what yet remains to be done in the course of administration, to apportion the compensation which has been fixed by law for the whole, according to sound judgment;" but we think that the true rule is stated in the paragraph immediately preceding the above quotation, viz.: "Where an administrator resigns or is removed, leaving the administration incomplete, there is no fixed rule of compensation for the

services he has rendered." And in the estate of *Miner*, 46 Cal. 564, following that rule, the Court said that the commissions are to be ascertained when "*the estate is ready for distribution.*" We scarcely see how sound judgment can determine how much the first administrator is entitled to, unless it knows and considers what the successor has done, and what the comparison is between his acts and those of his predecessor. The administration of an estate is an entirety. There may be different persons in office at different times or at the same time; but the claim of each to compensation must be considered with reference to the rights of each and all of the others.

Of course we are not considering the right of the outgoing administrator to commissions upon property which has been by him fully administered upon. In such case his successor has no right to share in the commissions upon that property.

The order of the Court below should be modified so as to reserve the rights of the appellant, as above indicated, and is affirmed in all other respects. So ordered.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 1.

[Filed May 18, 1880.]

[No. 6707.]

ADDRICH, APPELLANT,

vs.

WILLIS ET AL., RESPONDENTS.

ESTATES OF DECEASED PERSONS—INTERMEDDLING WITH THE PROPERTY OF AN INFANT—SATISFACTION OF MORTGAGE.

Appeal from the District Court of the Eighteenth Judicial District, San Bernardino County.

J. D. Boyer, for appellant.
C. W. C. Rowell, for respondents.

MCKINSTRY, J., delivered the opinion of the Court:

Defendant Henry M. never became executor of the estate of Edwin A. Willis, deceased. He did not qualify, nor were letters testamentary issued to him. Nor was he guardian of the person or property of the infant, Amelia Willis, Jr.

True, one wrongfully intermeddling with the property of an infant is sometimes held by equity as a guardian, but only (as in the case of an *administrator de son tort*) for the purpose of an accounting; he acquires none of the rights of a guardian. Pishon was appointed testamentary guardian—an office not in itself assignable, because a personal trust. If, however, it could be held that the policy of our law will permit a testator to provide by his will that a testamentary guardian therein appointed may delegate his powers, Henry M. never gave bond nor qualified as required by section 1758 of the Code of Civil Procedure.

Nevertheless, Henry M. Willis was a trustee holding the moneys of the infant, Amelia, Jr., which came into his hands in trust for her. The mortgage executed by him to secure such moneys was altogether for her benefit; and the fact that it is set up in her answer by her *guardian ad litem*, and relied upon herein, constitutes sufficient proof of delivery to and acceptance by her.

The Court below found that there was no registered *satisfaction* of the mortgage to Amelia, Jr., other than one "caused to be entered" by defendant Henry M. Willis, "acting as guardian." We understand this to be a finding that the marginal satisfaction purports to be executed by him *as* guardian. Whether, however, his pretended character appears upon the record is immaterial, since he was not in fact guardian. The record then showed an attempted satisfaction of a mortgage by the *mortgagor*, and plaintiff's assignor took with full notice that the prior incumbrance had not been satisfied.

It is urged by counsel that inasmuch as it was agreed between the assignor of plaintiff and defendant Henry M. Willis that the Hubbell mortgage should be paid out of the moneys loaned by the former, and the sum was paid then and there, the transaction operated an equitable assignment of the Hubbell mortgage; that the instrument sued on is in legal effect a continuation of the Hubbell mortgage; and, to the extent that the money loaned was used to pay off the Hubbell incumbrance, plaintiff should be decreed priority over the mortgage to Amelia Willis, Jr. Any finding on that subject, however, is entirely outside of the issues made by the pleadings; and one conclusive answer to the proposition of counsel is, that plaintiff has not sued as assignee of the Hubbell mortgage, but has brought this action to foreclose the mortgage to Drew.

Judgment affirmed.

We concur: Ross, J., Morrison, C. J.

DEPARTMENT No. 1.

[From the Bench, March 11, 1880.]

[No. 6590.]

IN THE MATTER OF THE ESTATE OF MARY CUNNINGHAM, DECEASED.

PROBATE—BAR. A judgment in a contest made for the probate of a will by attorneys appointed by the Court to represent absent parties, is no bar to a further action by such parties if brought within the statutory time.

Appeal from the Probate Court of the city and county of San Francisco.

R. Ash, for appellants.

J. F. Sullivan, for respondents.

Mary Cunningham, wife of Patrick Cunningham, died in July, 1876, leaving a will in the custody of the Rev. Hugh P. Gallagher, by the terms of which the bulk of the estate was left to relations of the deceased living in the Eastern States. H. P. Gallagher, who was named in the will as executor, presented the will for probate. The husband of the deceased opposed the probate of the will, and offered for probate a document bearing date December 14, 1870. Issues were raised on both wills, and a trial had before a jury. A verdict was found in favor of the will filed by H. P. Gallagher, and thereupon an order was made admitting the same to probate. An appeal was taken from this order by the husband, and after argument in this Court the matter was remanded back to the Probate Court for a new trial. A second trial was had before a jury in the Probate Court, and a verdict found for the will of December 14, 1870. Thereupon the Probate Court made an order admitting the last mentioned will to probate. The date of the judgment and order was March 20, 1878. A motion for a new trial was made and denied, and an appeal taken to this Court. Subsequently the appeal was dismissed. Up to this stage of the proceedings the respondents herein never appeared in this litigation. On both trials before the jury, the Probate Court made orders directing J. G. Severance (at the first trial) and J. F. Sullivan (at the second trial) to represent the non-resident heirs and legatees. On November 8, 1878, Kate Morgan, Ann Morgan, Rose Morgan, John Morgan, Thomas Morgan, and Mary Kearny appeared for the first time on their own behalf by their own attorney, J. F. Sullivan, and filed their petition for revocation of the probate of the will of December, 1870. Citation issued to the executor, and the petition was heard

on testimony taken at a former trial, according to stipulation. The Court below made the order of revocation. From that order and others this appeal is taken.

After argument the Court said: It is urged by counsel for appellant that the respondents were estopped from prosecuting their petition for the revocation of the probate of the will of December 14, 1870, by the order and judgment of the Probate Court based upon the verdict in favor of that will. But it seems that on the trial before the jury by whom the will of December, 1870, was upheld (as well as at the previous jury trial), the respondents were represented only by an attorney appointed by the Court. If they were parties contesting the will at the former trials, the contest (so far as they were concerned) was made by the attorney appointed by the Court, and section 1307 of the C. C. P. provides that a contest made by such an attorney "does not bar a contest after probate by the party so represented if commenced within the time provided in Article IV of this Chapter." There is no dispute that the present proceeding was commenced within such time. If respondents were not, within the meaning of the law, parties to the former contest, they were not bound by the former adjudication.

Section 1327 of the Code of Civil Procedure provides that "any person interested" may, at any time within a year after the probate of a will, contest the probate or validity of the will. And section 1829, that at the hearing "the Court must proceed to try the issues of fact joined in the same manner as in the original contest of a will."

Judgments and orders affirmed.

DEPARTMENT NO. 2.

[Filed May 26, 1880.]

[No. 7116.]

LIVERMORE, RESPONDENT, vs. HODGKINS, APPELLANT.

DISMISSAL OF APPEAL—WHEN DAMAGES WILL NOT BE AWARDED.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Stetson & Houghton, for respondent.
P. S. Colby, for appellant.

By the Court:

Judgment was rendered in the Court below September 12, 1877, in favor of plaintiff for the possession of certain lands

and for $700 damages, and for costs. On the 27th of January, 1880, an *alias* execution was issued for the damages and costs, which was levied upon certain real estate, and the sale thereof was advertised for February 23, 1880, which sale was, at the request of defendant's attorney, continued until the next day at 3 P. M., for the purpose of giving defendant time to pay the amount of the judgment. On the 24th of February, before the hour of 3 P. M., notice of appeal from the judgment was given. Thus it will be seen that the notice of appeal was given more than two years after the judgment, and more than one year after the time given by law in which to take an appeal; that under pretense of obtaining delay of the sale for the purpose of making payment of the judgment, the obtaining of the delay was really for the purpose of preparing papers for appeal. We are asked that, in dismissing the appeal, we award damages to plaintiff.

We are of the opinion that, under these circumstances, the giving of the notice of appeal was an abuse of means given by law to bring a case to this Court, and that such action should receive censure. Section 1209, subd. 4, C. C. P., doubtless suggests a course which might be pursued; but as no party is now before us on proceedings under that section, we herein make no order in that direction.

As the appeal is dismissed, we do not think that is a proper case for awarding damages under section 957, C. C. P.

The motion to award damages is denied.

DEPARTMENT No. 1.

[From the Bench, May 17, 1880.]

[No. 6616]

FREEMAN, APPELLANT, vs. BROWN, RESPONDENT.

DEFAULT—STIPULATION.

Appeal from the District Court of the Fourteenth Judicial District, Placer County.

C. A. Tuttle and *John M. Fulweiler*, for appellant.
Hall & Craig, for respondent.

Appeal from order setting aside default.

The Court—We are inclined to think that the Court had authority to consider the stipulation in connection with the affidavit, and that the stipulation and affidavit justified it in making the order. We will affirm this order.

Order affirmed.

Legal Facetiæ.

DURING a trial the Judge called a witness. No one answered, and an elderly man arose and solemnly said, "He is gone." "Where has he gone?" asked the Judge in no tender tone. "I don't know; but he is dead," was the guarded answer.

NOT long ago, in the Court of Appeals, an Irish lawyer, while arguing with earnestness of his cause, stated a point which the Court ruled out. "Well," said the attorney, "if it plaze the Court, if I am wrong in this, I have another point that is aqually as conclusive."

A LAWYER'S PRONUNCIATION.—In the course of an argument recently a barrister remarked: "What does Kitty say?" "Who's Kitty?" said the magistrate, "your wife?" "Sir, I mean Kitty, the celebrated lawyer." "Oh," said the magistrate, "I suspect you mean Mr. Chitty, the author of the great work on pleading." "I do, sir; but Chitty is an Italian name, and ought to be pronounced Kitty."

GOOD MORNING JUDGE.—"When I was traveling in Massachusetts, some twenty years ago," said a traveler, "I had a seat on the omnibus with the driver, who, on stopping at the postoffice, saluted an ill-looking fellow standing upon the steps with 'Good morning, Judge Sander; I hope you're well, sir!' After leaving the office, I asked the driver if the man that he had just spoken to was really a judge. 'Certainly, sir,' he replied; 'we had a cock fight here last week, and he was made a judge on that occasion.'"

BEATING THE COMPANY.—The *New York Clipper* tells a good story about a "drive" which was perpetrated on a Connecticut Western conductor a few days ago. A man boarded the train at a way-station, and paid his fare to a point a few miles distant. On reaching his destination, he concluded to proceed to a farther station, and finally continued on until he reached Winsted. Each time he paid his fare in cash to the conductor instead of buying a ticket at the station, although by this means the passage cost him considerably more. At last the conductor spoke to him of this, and suggested that it would be economy for him to buy a ticket, and asked him why he didn't. "Well," said the passenger, "I'll tell you. Some time last summer I got into a little trouble with this company, and they used me mighty meanly, so I just said to myself, 'That Connecticut Western Company won't never get another cent of my money if I live a hundred years;' and they won't, and that's why I pay my fare to the conductors." The conductor dropped the conversation at that point.

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Current Topics.

WITH this number we issue another supplement of twenty-four pages, being an able review of the late decision of the Supreme Court of this State in the *Denis Kearney habeas corpus* case, by DELOS LAKE, Esq., of the San Francisco bar. The opinion of the Supreme Court in the case referred to was published in the number of June 12th.

THE manufacturer of goods has no right to the exclusive use as a trade-mark of any words, letters, figures, or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. And letters or figures which, by the custom of traders or the declaration of the manufacturer of the goods to which they are attached are only used to denote quality, are incapable of exclusive appropriation, but are open to use by any one, like the adjectives of the language. Accordingly, where a manufacturer of cloth adopted as a mark to distinguish the best quality of its goods manufactured the letters "A C A," and to denote inferior qualities the letters "B" and "C" and "D": *Held*, that it could not claim the exclusive right to use the letters "A C A" as a trade-mark.—*Amoskeag Manufacturing Co.* vs. *Trainer*. Appeal from the United States Circuit Court, Eastern District of Pennsylvania. Opinion by Mr. Justice FIELD. Judgment affirmed.

Supreme Court of California.

DEPARTMENT NO. 2.

[Filed June 3, 1880.]

[No. 6956.]

THE KERN VALLEY BANK, RESPONDENT,

VS.

CHESTER, APPELLANT.

CONTINUANCE—ABSENT WITNESS. An affidavit for a continuance, on the ground of the absence of a material witness, must show that the evidence of the witness is material, and also due diligence in attempting to procure his attendance.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

V. A. Gregg, for respondent.
Stetson & Houghton, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal from a judgment of foreclosure, and from an order denying defendants' motion for a new trial.

The defendants are husband and wife, and filed separate answers to the complaint. The former, in his answer, denies the allegation of the complaint that the plaintiff had paid State and county taxes to the amount of $603, or in any amount. He further denied the allegation that no part of the interest on the principal sum claimed to be due on the note had been paid. The answer of the other defendant contains the same denials.

When the case was reached and called for trial, Mrs. Chester, one of the defendants, moved for a continuance upon her own affidavit, which stated in substance that her attorney was necessarily absent, being engaged in a distant county in the actual trial of a cause, and that her husband and co-defendant and one Force were both necessary and material witnesses in her behalf, and were necessarily absent, being at San Francisco—the former attending a trial of a case in which he was a party, and material and necessary witness. She did not state what she expected to prove by said witnesses, or either of them. It is sufficient to say of this affidavit that it does not show the materiality of the evidence which the defendant expected to obtain, or that due

diligence had been used to procure it. (C. C. P., sec. 595.) Granting or refusing a continuance on account of the absence of counsel is a matter which rests largely, if not wholly, in the discretion of the Court; and we cannot see that there was any abuse of discretion in this case. The defendant was represented by counsel, and the defense set up in her answer was not of a character to require any preparation in order to present it fairly. There was no error in allowing an attorney fee. (Stat. 1873–4, page 707.)

As before stated, there was an allegation in the complaint, and denial in the answer, that plaintiff had paid taxes upon the mortgaged premises. To prove that issue, only one witness was introduced on behalf of the plaintiff, who testified that he paid the taxes on the land described in the mortgage for the year 1877–8, amounting to $671.20, to the Tax Collector of Kern County, by buying the land in at tax sale; and that he, for the bank (plaintiff), received a certificate of such sale and purchase. On being asked by defendants' counsel how he knew it was the same land, witness answered: "By that certificate." The plaintiff then offered the certificate in evidence, and defendants' counsel objected to the introduction "on the ground that it did not appear that the land described in the certificate, or any part of it, was described in the complaint or mortgage sought to be foreclosed, and that it was irrelevant and immaterial." The objection was overruled; defendants excepted, and the certificate was admitted in evidence. Of that certificate it is sufficient to state that it does not embrace the mortgaged premises; and as it was the only evidence introduced to prove the payment of the taxes for the year 1877–8, there is no proof that the taxes for that year were paid. The Court, however, found that they were paid, and that the plaintiff paid them, and rendered a decree accordingly. The amount of said taxes, with interest, as found by the Court and inserted in the decree, is $716.51. To that extent the judgment is erroneous, and must be modified in that respect.

The affidavit in support of the motion for a new trial, on the ground of newly discovered evidence, does not disclose sufficient grounds for granting the motion.

Cause remanded, with directions to the Superior Court of Kern County to modify the judgment heretofore entered in the above entitled action by deducting therefrom the sum of $716.51, as of the date of the entry of said judgment; and as thus modified, said judgment and order denying a new trial are affirmed.

We concur: Thornton, J., Ross, J.

IN BANK.

[Filed June 14, 1880.]

[No. 7113.]

EWING, RESPONDENT,

vs.

THE ORO MINING COMPANY ET AL., APPELLANTS.

INCREASING CAPITAL STOCK OF CORPORATIONS. Section 359 relative to increasing the capital stock of corporations is inconsistent with Section 11 of Article XII of the Constitution, and therefore ceases to have any validity on and after July 1, 1880, in accordance with Section 1 of Article XXII; but it is not superseded by Section 11 of Article XII, because the section is not self-executing.

Appeal from the Superior Court, San Francisco County.

Garber, Thornton & Bishop, for respondent.
Stewart, Van Clief & Herrin, for appellants.

THORNTON, J., delivered the opinion of the Court:

This is an appeal from an order granting an injunction upon a complaint setting forth the following facts:

That the defendant company is a corporation created for mining purposes under the laws of this State, on the 11th day of October, 1878, with a capital stock of one million dollars, divided into one hundred thousand shares of the par value of $100, all of which stock was on or before the 11th day of June, 1878, subscribed for and held by stockholders, and is of the value of $6 per share; that the corporation was the owner of a mining property in Bodie District of the value of $750,000; that the plaintiff has been, since the 23d of March, 1880, the owner and holder of 489½ shares of the said stock; that the other defendants, except Stuart, were at the times mentioned in the complaint the duly qualified and acting directors of said corporation, and defendant Stuart secretary of the same.

The plaintiff further states that a proceeding was had to increase the capital stock of the defendant corporation to $13,400,000, divided into 134,000 shares, under the provisions of the Civil Code. (C. C., section 359.) It is alleged that those provisions have been complied with in all respects, and that the directors were authorized to take all steps necessary to effect such increase, and were also authorized to dispose of the 34,000 shares increase, or so much thereof as might be necessary to purchase for said corporation certain valuable mining property adjoining the mine now owned by it in Bodie Mining District; that the corporation,

through the directors and secretary, gives out and threatens to issue certificates for the increased capital stock, and to dispose of the same, or so much as may be necessary for the purpose above set forth; that the plaintiff demanded of the defendants, and each of them, that they refrain from issuing such certificates, or any of them, until such proceedings have been taken to increase the capital stock of the corporation as are required by Section eleven (11) of Article XII of the Constitution; that, unless enjoined, they will issue such certificates for such increase, and distribute them to such persons owning said mining property in consideration of their conveyance to the corporation defendant, all of which are illegal and invalid, and beyond the powers of the defendants; and if such certificates are issued and delivered to the persons aforesaid, such action will depreciate the value of plaintiff's stock, and will involve the corporation defendant in expensive controversies and litigation with the holders and claimants of such increased capital stock, to the great and irreparable injury of said defendant corporation and the plaintiff.

On a hearing, on notice and motion, an injunction was granted on the complaint, which was verified, as prayed for therein, requiring the defendants to refrain from issuing or delivering certificates for said increased capital stock or any portion thereof. From this order defendants appealed.

It is contended that the injunction should be retained, and that there was no error in granting it, because the proceedings taken to increase the capital stock were under provisions of the Civil Code which had no existence after the Constitution went into effect. The provisions of the Code referred to are found in Section 359. In this case, instead of the meeting required by it, the written assent of the holders of three-fourths of the *subscribed* capital stock of the corporation was procured, under subdivision 6 of the section referred to, which was declared by such subdivision to be as effectual to authorize an increase of the capital stock as if the meeting required by the section had been called and held.

Is this section of the Code annulled by the Constitution? To determine this we must examine the provisions of the Constitution which relate to it. Section 11 of Article XII of the Constitution is in these words:

"No corporation shall issue stock or bonds except for money paid, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not

be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law."

This section declares, as the settled policy of the State, which can in no manner be changed by any department of the government, that no corporation shall issue stock except for money paid, labor done, or property actually received; and all fictitious increase of stock shall be void.

It further declares that the stock and bonded indebtedness of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law. The latter clause must be controlled and limited by the provisions of the first clause, and certainly, as that which cannot be done directly cannot be accomplished by indirection. (*Cummings* vs. *State of Missouri*, 4 Wall. 326–9.) A corporation could not be allowed by any power known to the Constitution and laws of the State to effect, under the guise of a purchase of property, a fictitious increase of stock. It seems to us that a corporation could not increase its stock to an unreasonable amount beyond the value of the property actually received. This would appear to be indicated by joining the words "property actually received" with the words "money paid" and "labor done." This rule might be difficult of application, but such seems to be the rule laid down. The restrictions of the first clause are so manifestly prohibitory to the extent indicated by the above remarks, that the Legislature would at all times be bound by them. What the discretion in this respect must be to be exercised by the Legislature, it is unnecessary to say in advance of a case presenting it.

As to the latter clause, it is manifest that it is not self-executing. It does not of itself furnish a complete mode of accomplishing the object, which the Constitution allows to be carried out in terms by a general law, to be enacted by the Legislature. This law, however, must provide for a meeting, and the meeting must be called for the purpose, in such a case as this, of increasing the stock, and sixty days' public notice must be given, as may be provided by law—*i. e.*, in the mode to be prescribed by law.

It is sufficient in this case to determine that this clause is not self-executing—that is, legislation is required to enforce it. To attempt to define the limits of the legislative power in the case before us, it is manifest, is uncalled for.

Section 1 of Article XXII of the Constitution is in these words:

"That all laws in force at the adoption of this Constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this Constitution had not been adopted. The provisions of all laws which are inconsistent with this Constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this Constitution as require legislation to enforce them shall remain in full force until the first day of July, eighteen hundred and eighty, unless sooner altered or repealed by the Legislature."

As we have stated above, Section 359 of the Civil Code provided for an increase of stock through the medium of a meeting or by the written assent of the holders of three-fourths of the capital stock of the corporation. Very exact and stringent provisions are made in the section referred to as to notice, and other directions are given to be observed to accomplish the increase. This section furnishes a complete scheme to execute such purpose. The last subdivision (6) of this section, as stated above, makes the written assent of the holders of three-fourths of the *subscribed* capital stock of the corporation as effectual to accomplish the increase as if a meeting had been called and held.

These provisions are not such as are required under the section of the Constitution above quoted. (Section 11, Article XII.) The course pursued in this case of procuring the written assent of the holders of three-fourths of the subscribed capital stock is not contemplated in the Constitution at all. The provisions in the Code under which such course was taken are manifestly inconsistent with the provisions of the Constitution. The section provides for a notice of the time and place of meeting, etc., to be served personally on each stockholder resident in the State, at his place of residence if known, and if not known, at the place where the pincipal office of the corporation is situated, and be published in a newspaper published in the county of such principal place of business, once a week for four weeks successively. At what period of time prior to the meeting the personal service of the notice is to be made on the stockholder is not prescribed. In these respects, if not in others, the section referred to is inconsistent with the provisions of the Constitution in Section 11, Article XII.

As we have seen, this provision of the Constitution is not self-executing. It requires legislation to enforce it. It therefore was not in force when the proceedings to effect an increase of the stock of the corporation was taken in the case before us.

In this respect it is unlike the provision in the Constitution (Section 19, Article XI) considered and passed on in *McDonald* vs. *Patterson*, the opinion in which was filed on the 2d day of March, 1880. That provision was strongly prohibitory, was self-executing, and required no legislation to enforce it. It was binding on every one—every department of the Government and every source of authority to legislate—and took effect as soon as the Constitution went into operation in January of this year.

The conclusion reached is not affected by Section 22 of Article I of the Constitution. That section declares that "The provisions of this Constitution are declared to be mandatory and prohibitory, unless by express words they are declared to be otherwise." This section, as a rule of construction, applies to all sections alike. It applies to Section 1 of Article XXII as much as to Section 11 of Article XII, or any other. The provision of the former section that "all laws which are inconsistent with such provisions of the Constitution as require legislation to enforce them shall remain in full force until the first day of July, 1880, unless sooner altered or repealed by the Legislature," is a mandate that we cannot disregard. The prohibitory language used in Section 11, Article XII, so far as affects this case, is a provision operating upon the Legislature when they come to enact the general law referred to in it, as a restriction upon its power to the extent expressed in the section. It is not a positive prohibition annulling a law, even if inconsistent with the restrictions to be inserted in the general law when enacted, but a prohibition operating on the Legislature when they enact the general law. In fine, it is a prohibition to be made effective by legislation, with the qualification that if the Legislature enacts no such general law, or does not repeal or alter the existing law before the first day of July, 1880, such law, though inconsistent with the provisions of the Constitution which require legislation to enforce it, ceases to be of any validity or effect on the day just named.

The provisions referred to in Section 1, Article XXII, must contain the express words mentioned in Section 22, Article I; otherwise they are of no effect in every case where language apparently prohibitory is used in a section requiring legislation to enforce it. Such a construction as that

indicated by the last clause of the preceding sentence would in effect nullify the mandate of Section 1, Article XXII. To follow such a construction would be to disregard the mandate under the guise of obeying it. The latter clause of Section 11, Article XII, is only a restriction on legislative power thereafter to be exercised, and is not a negation of all power to the Legislature. It plainly recognizes the power of the Legislature to act by general law to accomplish an increase of capital stock, restrained by the other provisions of that section.

It follows as a deduction from the above that the order of the Court below must be reversed, and the cause remanded.

So ordered.

We concur: McKinstry, J., Ross, J., Sharpstein, J., McKee, J.

DEPARTMENT No. 1.

[Filed June 4, 1880.]

[No. 6420.]

LANTERMAN, APPELLANT, vs. WILLIAMS, RESPONDENT.

PARTITION OF LAND. It is essential to the validity of a parol partition of land that the parcels partitioned be so marked or located on the ground that the parties interested can with certainty know where they are.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Barclay & Wilson, for appellant.
Gould, Blanchard & Stump, for respondent.

Ross, J., delivered the opinion of the Court:

This action was brought to obtain a partition of the rancho "La Canada," situated in Los Angeles County. The plaintiff, in his complaint, after alleging that he and the defendant, A. W. Williams, are each the owner of an undivided one-half of the rancho, by virtue of a conveyance made to them by A. Glassell and A. B. Chapman in December, 1877, proceeds and alleges that on the 16th of December, 1875, plaintiff and Williams entered into the possession of the property under a contract previously made by them with Glassell and Chapman for its purchase, and that shortly after their entry thereon they "agreed upon a partition thereof in the manner following, to-wit: That a line or avenue should be run as nearly as might be through the centre of said

rancho, from the easterly to the westerly ends thereof, and other lines were to run from the northerly to the southerly boundaries of said rancho as nearly as might be parallel with the east and west section lines of the United States surveys, extending over or produced so as to extend across said rancho; said parallel lines to be eighty rods apart, measured along the township or section lines running through said rancho from east to west, so as to divide the entire area included between each pair of east and west section lines, prolonged as aforesaid into four lots of equal width, extending across said ranch from north to south; these four lots being further subdivided by the center line aforesaid, were to be numbered alternately on the northerly and southerly sides of said centre line; and it was agreed by and between the said plaintiff and defendant Williams that plaintiff should have the odd numbered lots, and the defendant the even numbered lots thereof, as their respective shares of said rancho, to be released and quit-claimed by each to the other respectively. With the exception of lots Nos. 15 and 18, upon which plaintiff and defendant Williams respectively had decided and have since placed their residences and improvements, it being agreed between the said parties that plaintiff should have seventy-two rods of lot No. 15, and defendant Williams should take the whole of lot No. 18, and the remaining eight rods of lot 15 aforesaid. The plaintiff and defendant Williams located a portion of the centre line aforesaid for an avenue, and placed their improvements upon the lots aforesaid as nearly as the same could be ascertained under existing surveys."

It is then averred "that no regular or correct survey has been made of the subdivision or lines of said rancho as aforesaid;" that Williams has been and is engaged in disposing of various lots of land in the rancho, "and measuring them off himself as the lots to which he would be entitled under the agreement aforesaid;" that the measurements have been made without the plaintiff's consent, and are incorrect; and that the plaintiff has requested Williams to join him in securing some comptent surveyor to subdivide the rancho in accordance with the agreement, which Williams has refused to do, and the plaintiff asks that the land be partitioned in accordance with the alleged agreement, which, it is averred, can be done without injury to either party.

In his answer, Williams denies that he and the plaintiff own or hold the whole or any part of the rancho as tenants in common, or that they have any joint or common interest therein or in any part of it. Proceeding, he alleges that

prior to the making of the contract with Glassell and Chapman for the purchase of the property, he and plaintiff verbally agreed that immediately upon making the contract they would divide and partition the land equally, and would exchange deeds when they should receive title, and "that said agreement was a part of the consideration and inducement upon which the defendant Williams acted when he entered into said agreement with said plaintiff for the purchase of said rancho from said Glassell and Chapman."

The answer then sets out that immediately after the execution of the contract for the purchase of the rancho, the plaintiff and the defendant Williams entered into possession, "and agreed mutually between each other how and in what manner they would divide and partition said rancho between themselves, and reduced said agreement to writing. That said agreement is in words and figures as follows, to-wit:

"This article of agreement made the first day of————, A. D. 1876, between Jacob L. Lanterman and Adolph W. Williams, both of La Canada, in the county of Los Angeles, State of California, witnesseth: That the parties have mutually purchased and do now divide the U. S. grant La Canada, by mutual consent and agreement, as follows: First, commencing the division of said grant by drawing a line from the grant boundary line at a point at or near its centre to a point 80 rods east of township line between townships twelve (12) and thirteen (13) west, San Bernardino meridian, said line running north 64° west; thence north 61° 5′ west to (or as near as practicable for a highway) its intersection line between sections 35 and 34, township 2, north 13 west, S. B. M.; thence to the west boundary line of said grant to a point where the section line between sections 19 and 20 of said township intersect said west boundary line; the above grant centre line is to deemed the centre dievial line between the north and south half of said grant; that all lots shall face upon it; that it shall be a highway line for a road four rods wide, to be known as "Michigan Avenue;" that it is also to be, as far as practicable, the water line of said grant; that said grant is divided into forty-six lots, lot No. 1 being the northeast lot, and lot No. 2 the southeast lot, No. forty-five (45) the northwest lot, and No. forty-six the southwest lot. All are equally numbered, odd and even, on both sides of the avenue. That all the odd-numbered lots are Dr. J. L. Lanterman's, and that all the even-numbered lots are A. W. Williams'; that lot No. fifteen (15) is seventy-two (72) rods east and west in width, and lot number eighteen (18) is eighty-eight (88) rods in width east and west. That lot

eighteen has equal rights in the waters of lot (15) fifteen, and equal duties and rights of way to spring, to repair, husband and carry one-half (½) of said waters. That all waters (save those wells dug by parties on their own lots) that can be found on said grant, procured for it, or conveyed on it, are of equal rights, interest, and duties. That all highways and roads on said grant are of equal duties; that for the purpose of taxation the grant remains as at present, taxable in a body, each party or their representatives to pay one-half (½) of the entire assessment, taxes, or other legal charges. That all lots (save the six above referred to—viz., 1, 2, 15, 18, 45, and 46) are 80 rods wide east and west, and all face on the avenue, and are all bounded by said centre line and the grant line on the north and south, and east and west by north and south township, section, quarter-section, or half quarter-section lines, adopting for said north and south lines only the posts now found on said grant, established by Mr. Norway, but expressly rejecting and protesting to said Norway's grant lines as false and non-conformable to U. S. patent for said grant. That when a deed is taken by us or our representatives, either by payment in full for said grant or by partial payment and mortgage, we will, and our representative shall, deed to the other freely and fully their interest by original purchase to all those lots belonging by the above agreement to either party; and that so long as we have mutual rights and interests in said grant we will, with God's help, deal kindly and justly each with the other.

"In witness whereof, we have hereunto set our hands and seals, date and place first above written.

"A. W. WILLIAMS. [Seal.]"

The next averment of the answer is that the plaintiff *refused to execute* this agreement, and it is then alleged that, immediately after taking possession of the land, plaintiff and defendant Williams commenced the division pursuant to their agreement, and actually and completely partitioned it, and "that a map was made correctly representing said division and partition into lots of said rancho as actually made and agreed upon by the plaintiff and the defendant Williams," and that actual possession was taken by the respective parties of their respective portions. A cross-complaint was filed by the defendants, containing substantially the same averments as are found in the answer, and the defendants asked that the Court by its decree "confirm the division and partition of said rancho as actually made by the plaintiff and the defendant Williams, in accordance with said contract as above particularly set forth;" that the Court decree that the

map referred to is a correct representation of the grant as partitioned by and between the plaintiff and Williams, and that it be made a matter of record; that the plaintiff be compelled to execute to Williams a good and sufficient deed for all the even numbered lots marked upon the map; that the plaintiff be compelled to disclose what waters he has discovered and found upon said grant, and procured for it, and allow the defendant Williams an equal right and interest thereto upon his performance of the conditions imposed in said contract; that whatever waters may be found on said grant, procured for it or conveyed on it by either plaintiff or said defendant Williams, be decreed by this Honorable Court to be for their equal right and interest, upon their performing the conditions in said contract set forth;" and the Court below so decreed, and also gave defendant judgment for attorneys' fees in this action and for one hundred dollars damages for plaintiff's failure to deed to the defendant the even numbered lots.

The decree cannot be sustained for several reasons, but it will be sufficient to state one.

The plaintiff and Williams made the contract for the purchase of the rancho on the 16th of December, 1875, and went into immediate possession. The title was conveyed to them in December, 1877. The agreement between them for the partition of the land was a parol agreement; for both the answer and cross-complaint expressly allege that the written contract therein set out was never executed by the plaintiff, but that on the contrary he refused to execute it. The parol agreement for the partition was clearly invalid. All of the evidence shows an absence of the essential requirements to a valid partition of that character. Williams himself testified: "The map of partition was made in the month of December, 1875, and January, 1876. The agreement of partition was made at indefinite periods between the time of the purchase and March 1, 1876. I give you the outside limits. It was made at different times and from different sections of the agreement, which have all to be discussed. I cannot tell when it was finally made, but it was completed before the last of February, 1876. * * * All of the subdivision lines of the lots marked on the map have not been surveyed. Every lot which lines upon the avenue has been surveyed. The avenue has not been surveyed through, but all the practical part of the grant—the east half, from the mountain to the Arroyo Seco—was. There are two or three miles there that has been surveyed; some portions of it remained unopened, but the Doctor's flags remained stand-

ing. I should think three miles of the avenue has never been run west. It is possible for you to locate every one of those lots without an instrument. I could take the stakes and lines, and locate every one of them. I should do it by triangulation. The lines of those lots are not marked on the ground. Some are and some are not. At the time my deposition was taken I said I could find twenty-three lots readily without the use of an instrument. I could find every one without the use of an instrument. With a board and thread I could find them by triangulation. I only know where twenty-three are that I have been on. I know where they are by sight, and triangulation, and surveying, by running various lines. * * * Q.—Does the Doctor (plaintiff) know where his lots are? A.—His sources of knowledge are equal to mine. I didn't say when my deposition was taken that no one else could find them unless they had my full notes. I said most any one else could find them. By the aid of the field notes my surveyor could find them even if these lines were obliterated. If Mr. Norway's posts were gone, he could go to my field notes and restore them. * * * Q.—Have you any knowledge as a surveyor? A.—Such as I might have acquired by a military education in part, and some practice of it in the field. Some practice before marriage, but none since, except in the army. * * * Q.—You have studied surveying? A.—Yes, sir; I can tell whether my instrument varies by taking an observation of the astra polaris, or perhaps any other star; and I can tell whether my instrument is in order, and I can tell when any magnetic variations occur—how much it would be. I can tell when there is local attraction."

The foregoing is only a portion of the testimony of the defendant Williams, who made the map referred to; but it is enough to show beyond all question that the agreement for the partition could not have been followed by such possession as the law makes essential to its validity. Many of the lots were never marked or located upon the ground at all, and neither of the parties could with certainty know where they were. Under such circumstances it is perfectly obvious that a separate and distinct possession by either party was an impossibility. We have no doubt of the invalidity of the alleged partition. (*Elias* vs. *Verdugo*, 27 Cal. 421; *Long* vs. *Dallarhide*, 24 Cal. 218; Freeman on Co-tenancy and Part., section 398.)

There seems, however, to have been no necessity for this litigation. There appears to be very little, if any, difference respecting the wishes of the parties in the division of the

land; and a survey sufficient to render certain the respective tracts might doubtless have been made, and deeds exchanged, for much less than the cost of the litigation. If, however, the parties are unwilling or unable to agree upon a division, the Court must divide it for them, and make such partition as to it may seem equitable and just.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Morrison, C. J., McKinstry, J.

DEPARTMENT No. 1.

[From the Bench, May 20, 1880.]

[No. 7117.]

FREEMAN, RESPONDENT, vs. CAMPBELL, APPELLANT.

PARTNERSHIP—FINDINGS—INSOLVENCY PRACTICE.

Appeal from the District Court of the Tenth Judicial District, Colusa County.

Jackson Hatch and *W. G. Dyas*, for respondent.
A. L. Hart, for appellant.

Mr. Justice McKINSTRY presiding.

We believe that there is no sufficient averment in this complaint that the promissory note was executed by the makers as partners, or for a consideration which passed to the partnership. Nor do we think that the findings determine that fact in terms. There is a finding that they are partners, and there is a finding also that they executed this promissory note; but no distinct finding that it was a partnership note, or that those persons executed it as partners.

We find also in respect to the matter of insolvency, which is alleged in the answer, and upon which there is no finding in the record, that (inasmuch as the appeal was taken from the District Court prior to the date when that Court went out of existence) it would be impracticable to return the case to the Superior Court, with direction to find upon the issue in respect to insolvency alone; and the case can only be disposed of by ordering that the judgment be reversed and cause remanded to the Court below, where the parties can make such application for amendments of the proceedings as they may be advised is for their interest.

Judgment reversed, and cause remanded for further proceedings.

DEPARTMENT No. 2.

[Filed June 11, 1880.]

[No. 6702.]

TRACY, APPELLANT, vs. COLBY, RESPONDENT.

PURCHASE BY PROBATE JUDGE OF PROPERTY OF AN ESTATE. A Probate Judge who orders a sale, and who would have the power to confirm it or set it aside, is within the reason of the well-established rule that trustees, administrators, executors, solicitors, and assignees of a bankrupt cannot make a valid purchase of any part of the estate in respect to which they have duties to perform; and evidence tending to show that a Probate Judge was interested in a sale of realty belonging to an estate should not be excluded.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Stetson & Houghton and *Geo. E. Otis*, for appellants.
V. A. Gregg and *R. E. Arick*, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an action brought by F. A. Tracy, guardian *ad litem* of the minor heirs of Thomas Baker, deceased, and the widow of said Thomas Baker, to obtain a decree setting aside certain conveyances made by the administratrix of the estate of Thomas Baker, deceased, to defendant Howlett, on the ground that the purchase made by said defendant Howlett was made in part in the interest of defendant Colby, the then County Judge and *ex officio* Probate Judge of Kern County.

The facts about which there is no controversy in this case are: That Thomas Baker died intestate; that his widow was duly appointed administratrix of his estate; that pursuant to an order of the Probate Court of which defendant Colby was Judge, she sold at public auction on the 2d of December, 1874, the land described in the complaint and belonging to said estate, to the defendant Howlett; that on the 20th day of December, 1874, said sale was confirmed by said Probate Court, said defendant Colby still being Judge thereof; that on the 4th day of January, 1875, said administratrix signed, sealed, and acknowledged a conveyance of said land, but did not deliver the same to said defendant Howlett until the 28th day of January, 1875; that on the same day that said deed was delivered by said administratrix to said defendant Howlett, he executed and delivered to said defendant Colby, who was still Judge of said Probate Court, a deed of an undivided one-half of said land, for which he paid to said defendant

Howlett one-half of the sum which the latter had paid for the whole of said land. It is alleged in the complaint and denied in the answer that said last mentioned conveyance was made pursuant to some agreement or understanding between said defendants entered into prior to the sale of said land by said administratrix. Upon this issue the finding of the Court is in favor of the defendants.

On the trial the plaintiffs called as a witness one Julius Chester, who testified that he was acquainted with the defendants, and that on the day of the sale of said land by said administratrix he had a conversation with the defendant Howlett in regard to his purchase of said land. The plaintiff's counsel then asked the witness some questions, so framed as to elicit from him what defendant Howlett at that time said about any one being interested with him in his said purchase. These questions were objected to on the ground that no proper predicate had been laid "in this, that the allegations in the complaint are a conspiracy between the defendants, and it has not been shown that the defendants were both present at the conversation offered to be introduced." The objection was sustained, and plaintiffs excepted. Thereupon plaintiffs offered to "prove by witness that on the day of the Baker estate sale, and before the sale took place, defendant Howlett came to witness, and in a conversation then had with him told witness that he (Howlett) was going to bid in certain land at said sale, and that the purchase was to be made for and in the interest of himself and defendant, P. T. Colby." The action of the Court upon this offer is stated as follows: "Offer refused by the Court because the proper predicate has not been laid, showing that P. T. Colby, the defendant, was present or had knowledge of such offered conversation." Plaintiffs excepted. If the evidence offered was material, its rejection cannot be sustained. The rule "admitting the declarations of a party to the record in evidence applies to all cases where the party has *any interest* in the suit, whether others are joint parties on the same side with him or not." (1 Greenleaf's Ev., 172.)

As to the materiality of the evidence offered we entertain no doubt. The defendant Howlett is not shown to have occupied any position which forbade his purchasing property for himself at said administratrix's sale; and the sale to him can be avoided only by proving that some person who could not, upon well-established principles, be permitted to purchase or participate in the purchase of said property at such sale, was interested in the purchase made by Howlett.

If the defendant Colby stood in such a relation to the estate of the deceased as would render a sale of any part of it to him voidable, at the instance of the heirs of said estate, then a purchase by him and another person jointly would make the whole sale voidable. It became therefore of the first importance that the plaintiffs should prove that Howlett was not buying for himself alone, but that he was buying for himself and Colby jointly. And the declarations of Howlett at the time and place of the sale to that effect, taken into consideration with his subsequent conveyance of an undivided half of the property which he purchased, to the defendant Colby, would, if not otherwise satisfactorily accounted for, tend very strongly to prove that both were interested in the purchase nominally made by one of them. And if such were found to be the fact, the heirs of the estate would be entitled to have the sale set aside. That trustees, strictly so-called, and administrators, executors, solicitors, and assignees of a bankrupt cannot make a valid purchase of any part of the estate in respect to which they have duties to perform, is too well settled to admit of argument. And if a judge who orders a sale and has the power to confirm or set it aside, is within the reason of the rule, it is not of the slightest importance that in the enumeration of persons to whom the rule applies, courts and text-writers have not specifically mentioned judges. There is, however, one reported case which has been brought to our attention in which the rule was applied to a Judge of Probate. In *Watson* vs. *Torrey*, Harrington's Mich. Ch. Reps. 259, a sale was set aside on the ground that the judge who ordered the sale became interested in the purchase. The objection to an administrator's purchasing at a sale of the estate upon which he is administering is that it places him in a position where his interest may clash with his duty. The objection applies with equal if not greater force to the purchase by a judge of property which he has ordered to be sold, and the sale of which he must confirm before any title can pass.

Besides, a sale of this character is a judicial sale, in which the person conducting the sale is the mere organ of the Court. "A bid offered to the person conducting the sale is a *bid offered to the Court*, and a bid accepted by such a person is a bid *accepted by the Court*, for its future consideration and judicial determination in confirming or refusing confirmation of the sale." (Rorer on Judicial Sales, sec. 23.) Any evidence, therefore, having a tendency to prove that the defendant Colby was interested in the bid of the defendant Howlett was admissible on the trial of this action. And the ad-

missions and declarations of Howlett to that effect were clearly admissible. The finding of the Court "that on the 28th day of January, 1875, the said John Howlett conveyed one undivided half of said lands to P. T. Colby (co-defendant), upon a contract and agreement made on that day, and not in pursuance of any fraudulent contract made prior thereto," is defective. It leaves room for an inference that the conveyance might have been made pursuant to an agreement entered into prior to the administratrix's sale, which, in the opinion of the Court, was not *fraudulent*. If such an agreement was entered into before said confirmation, it is wholly immaterial whether it was *actually* fraudulent or not. The finding should be that the conveyance was or was not made pursuant to an agreement made between the defendants prior to the confirmation of the administratrix's sale.

A judge cannot act in an action or proceeding in which he is interested. (C. C. P. 170; *People* vs. *De La Guerra*, 24 Cal. 173; *Dimes* vs. *Proprietors of Grand Junction Canal*, 3 House of Lords Cases, 750.)

Judgment reversed, and cause remanded for a new trial.

We concur: Myrick, J., Thornton, J.

IN BANK.

[Filed June 10, 1880.]

[No. 6939.]

THE PEOPLE vs. R. WEST PEARSON.

UNPROFESSIONAL CONDUCT. Where an attorney advised a client to sign a false affidavit, held that it was unprofessional conduct, for which he should de disbarred.

A. M. Heslep, for informant.

Sieberst & Bryant, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is a proceeding upon information to have the respondent—who is an attorney and counselor of this Court—removed, and to have his name stricken from the roll of attorneys and counselors of this Court on the ground that he has violated his duties as such attorney and counselor.

He is accused in and by the information filed herein of having agreed with one Eliza Burridge to procure a divorce for her from her husband for the sum of $45; that she paid respondent that sum, and that he prepared a complaint which she verified, in which it was alleged that the said

Eliza was married to her said husband on the 2d day of September, 1877, and that her said husband had neglected to provide for her the common necessaries of life, he having the ability to do so, and that said willful neglect had continued for a period of more than one year next preceding the commencement of said action. It is charged in the information that said Eliza was not married on said 2d day of September, 1877, nor until the 2d day of September, 1878, and had only been married about seven months when said complaint was verified, and that she so informed respondent at the time she verified said complaint. That complaint was never filed, although a copy of a summons was attached to it. The complaint was entered in the Fifteenth and the summons in the Nineteenth District Court. Afterwards, but within less than one year after said marriage, another complaint was prepared and verified, and filed in the Fourth District Court, which contained the same allegations as the first in relation to the marriage of the parties and the willful neglect of the husband. It does not appear that any proceedings were ever had in the latter action beyond the filing of a demurrer to the complaint by the husband.

It is charged, and the charge is supported by the testimony of both the parties to that action for divorce, that the respondent was not only told, but repeatedly told, that the parties were not married on the 2d day of September, 1877, as alleged in the complaint, but that they were married one year thereafter, and several months less than one year before the commencement of said last mentioned action; and the plaintiff in that action states in her testimony that when she informed the respondent herein that the allegation in respect of said marriage was not correct, he took a pen and pretended to correct it. It appears, however, on the face of the complaints, that no such correction was made in either case.

There are some other charges of disreputable acts, which it is unnecessary to notice at this time. It is sufficient for the purposes of this proceeding that it is shown by uncontradicted evidence that the respondent prepared a complaint, and advised his client to verify it, which alleged things which he knew to be false, and which she states that he led her to suppose had been corrected before she verified it. Nor is it necessary to comment upon the conduct here disclosed. The respondent has not answered the accusations against him, although abundant time in which to answer them has been allowed him. He introduced no evidence in his own behalf, and did not even cross-examine the witnesses who testified against him.

Therefore it is ordered that the name of Robert West Pearson be stricken from the roll of attorneys and counselors of this Court, and that he be permanently deprived of the right to practice as an attorney or counselor in the courts of this State.

We concur: Myrick, J., Thornton, J., Ross, J., McKee, J., McKinstry, J.

DEPARTMENT NO. 1.

[From the Bench, May 17, 1880.]

[No. 6443.]

CARMICHAEL, RESPONDENT,

vs.

McGILLIVRAY, APPELLANT.

FINDINGS. Sufficiency of findings to support a judgment of foreclosure.

Appeal from the District Court of the Fourteenth Judicial District, Placer County.

Chas. A. Tuttle and *Charles Tuttle*, for respondent.
Gray & Hoover, for appellant.

(Counsel for appellant not appearing, counsel for respondent presented his case to the Court by reading his points and authorities.)

The Court—The only point made by the appellant is, that the findings are insufficient to support the judgment.

Counsel for respondent—No findings were necessary, and I cannot see where he denies our allegations. I don't see that the answer of the Dardanelles Company raises my issue. I cannot see anything to try in this answer. The Court finds that our mortgage was given as alleged in our complaint. In the next place no findings were necessary, because the defendant did not appear at the trial. That is a waiver of the findings. (Sec. 634, C. C. P.) I think the findings cover the whole point.

The Court—The findings are that you have the note and mortgage, and that the mortgage is duly recorded——

Counsel for respondent—And that the defendant (the Dardanelles Company) bought the property after the mortgage was given. This is an appeal from the judgment alone.

The Court—Judgment affirmed.

DEPARTMENT No. 1.

[From the Bench, May 29, 1880.]

[No. 6525.]

RENKEN, RESPONDENT,

vs.

BELLMER ET AL., APPELLANTS.

DELIVERY OF NOTE AND MORTGAGE. The delivery and recording of a mortgage to secure a debt, and the payment of interest thereon for a year prior to the bankruptcy of the mortgagor, is a sufficient delivery of the note and mortgage. The assignee of the bankrupt cannot ignore the debt because the note was not in fact delivered.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

L. S. Taylor, for appellants.
A. C. Freeman, for respondent.

Counsel for appellant—The only question in this case is as to the fact of the delivery of the mortgage at a time preceding the adjudication in bankruptcy, at any time when the bankrupts had authority to deliver it. The note was not delivered. The mortgage was placed in the hands of the recorder for record. The suit is brought upon the theory that the note was a valid note, and had been executed and delivered, and the mortgage was foreclosed to pay that note.

Counsel for respondent—The pleadings *admit* the execution and delivery of the mortgage June 12, 1876, which was nearly two years prior to the adjudication in bankruptcy. But if the delivery were not admitted, the only question would be, Can a mortgagor who owes money, and who makes, signs, and acknowledges and files for record a mortgage, believing and intending it to be a valid delivery, who notifies the mortgagee that he has taken the money on the note and mortgage, and receives a letter back ratifying the transaction, and who receives from the mortgagee in Germany a demand for the payment of interest, and who pays one year's interest upon that note and mortgage nearly one year prior to the adjudication in bankruptcy—could he a year after that, had he not become a bankrupt, repudiate the transaction and say that that was not a valid delivery? If *he* could not, the assignee in bankrupty cannot.

Mr. Justice McKinstry, presiding:

We think there was sufficient delivery of the note and mortgage, and the judgment must be affirmed; and it is so ordered.

Before Jos. P. Hoge, Esq., Referee.

WILLIAM SHERMAN ET AL., EXECUTORS, ETC., AND WILLIAM SATTERLEE ET AL., BENEFICIARIES.

CONSTRUCTION OF WILL. Where a will gives all the personal property to certain persons, and then gives all the real estate to the same and other persons in certain proportions, and after the date of the will the testator entered into certain contracts for the sale, upon certain conditions, of certain portions of the real estate: *Held*, that the property mentioned in said contracts must be distributed as real estate, and not as personal property.

This case, involving the construction of the will of John Satterlee, deceased, was submitted by the parties interested, upon an agreed statement, to J. P. Hoge, Esq., of the San Francisco Bar. The facts are stated in the opinion of the referee.

Hall McAllister and *T. I. Bergin*, appearing for the legatees, argued:

1. Both the contracts of sale antedate the two codicils, and each codicil constitutes a republication of the will. A codicil amounts to a republication of the will *proprio vigore*, and independently of any expressed or implied intention to that effect. (1 Redfield Wills, 348–354; 1 Williams' Exrs. 251–257; Neff's Appeal, 48 Penn. St. 501; Civil Code, sec. 1287; *Farrar* vs. *Earl, etc.*, 5 Beavan, 1.) If either codicil constitutes a republication, the will must be construed by the Civil Code.

2. A will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates the contrary intention. (Redfield Wills, 359; *Wetmore* vs. *Parker*, 52 N. Y. 463; Civil Code, sec. 1331.)

3. If the contracts with Hemme and Canavan were not rescinded at the time of the testator's death, no subsequent act or matter can alter the relative rights of his representatives. (*Bennett* vs. *The Earl*, 19 Verg. 170; *Tebbett* vs. *Vaules*, 6 Simons, 40.)

4. Testator did nothing tending to a rescission of either contract. Canavan was not in default at the time of testator's death, because the property was, from July 9, 1872, to May 16, 1876 (nearly four months after testator's death), incumbered by a mortgage to the Hibernia Society. Canavan was only obligated to pay the purchase price of $60,000

"within six months after a certain action in the Circuit Court is disposed of by final judgment in favor of defendant (Satterlee), *and* said property is free from incumbrances," etc.

5. Where a contract is entered into for the conveyance of land on the payment of the purchase money, the estate vests in equity in the vendee, and the vendor retains the legal title as a mere lien or security for the unpaid purchase money. (*Love* vs. *Sierra Nevada, etc.*, 32 Cal. 653; *Love* vs. *Watkyns*, 40 Cal. 565.) Equity looks upon things agreed to be done as actually performed. (*Arnold* vs. *Arnold*, 1 Beavan, 352.)

6. By a contract of sale the land conveyed becomes real estate in the purchasers, and will descend as such to their heirs or devisees. The vendor holds the legal title as trustee for the purchasers. The purchase money due upon the contract is, as to the vendor, personal estate, and upon his death passes to his personal representatives as part of his personal estate. (*Thompson* vs. *Smith*, 63 N. Y. 303; *Lewis* vs. *Smith*, 5 Selden, 502; *Mayer* vs. *Hinman*, 3 Kernan, 188; *Mare* vs. *Burrows*, 34 Barb. 173; *Schrœppel* vs. *Hopper*, 40 Barb. 430.) The English authorities, down to 1842, are reviewed by Hoffman, V. C., in *Selden* vs. *Pearsall*, 1 N. Y. Leg. Obs. 278. (*Vide* 1 Strong Eq. Jur., sec. 790; 2 *Id.* sec. 1212.)

7. Section 1301 of our Civil Code is substantially the same as section 14 of our Statute of Wills of 1850, and does not go beyond, or practically or in its results differ from, the English statute 1 Vict., ch. 26; and under the settled construction of that statute the contracts worked an ademption, if not a revocation. (*Farrar* vs. *Earl, etc.*, 5 Beavan, 1; *In re Manchester, etc.*, 19 Beavan, 365; *Gale* vs. *Gale*, 21 Beavan, 349; *Ex parte Hawkins*, 13 Simons, 569; *Galliers* vs. *Allen*, 13 Simons, 577.)

Garber, Thornton & Bishop, and *Craig & Meredith*, for the devisees:

1. Our statutes differ radically from the English statute 1 Vict., construed in the cases cited by counsel. Under our statute the will does not speak from the death, but from its date; and a devise of all testator's realty is *specific*, as at common law. (*McCall* vs. *Jones*, Western Law Monthly, vol. 4, p. 627; *Allen* vs. *Harrison*, 3 Call, 298; *Warner* vs. *Sweringed*, 6 Dana, 195; *Smith* vs. *Edrington*, 8 Cranch, 66.) That a devise of all the realty is still specific, even under 1 Vict., see *Hensman* vs. *Fryer*, L. R. 3 ch. App. 424.

2. If there had been no codicils, section 14 of our statute

of 1850 disposes of the case in our favor. (*Powell* vs. *Powell*, 30 Ala. 704.) Under section 1375 of our Civil Code (the codicils aside) the case must be decided as if the Code had not been enacted. This would have been so, even without the saving clause and operation of section 1375, on general principles against retroactive legislation. (*Carroll* vs. *Carroll's Lessee*, 16 How. (U. S.) 275.) But section 1375 is conclusive, as has been adjudged. (*Parker* vs. *Bogardus*, 1 Selden, 309.)

3. As to the codicils, the authorities cited by counsel merely state the general rule, and fully recognize the exceptions to that rule. The exception is well stated by Cockburn in his argument in *Doe* vs. *Hale*, 15 Ad. & Ell. (N. S.) 848: "The general rule, no doubt, is that a codicil confirming a will republishes it, but it is not an inflexible rule; and whenever it appears that the testator's intention was by the codicil to ratify the devise as it was in the original will, and that if the will was brought down to the date of the codicil the devise would be altered, the law does not frustrate his intention, and cause the intended ratification of the devise to operate as an alteration of it."

It is manifest from all the papers probated that the testator, Satterlee, intended his will to stand just as it would have stood if he had never made the first codicil. It is equally evident that by the first codicil he intended to dispose of the very same property he had disposed of in the will, only to different persons. After the making of the codicil—after the annulling of the codicil—equally as at the time of first executing the will, the Hemme and Canavan property was devised, and passes to the devisees subject only to the rights of Hemme and Canavan, because that was what went to the nephew by the will; that was what was taken from him by the codicil, and that was what was restored to him by the last writing, which was no codicil at all. (*Vide* L. R. 2 P. & D. 40; 1 Wms. Exrs. 166, 128; 69 Pa. St. 177; 1 Wms. Exrs. 253, 214; L. R. 1 ch. div. 234.)

In *Stillwell* vs. *Mellersch*, 20 L. J. Rep. 361, Lord Cranworth says: "When it is said a codicil makes the will speak from the time of republication, that does not mean that you are to read the will in any way different from the mode in which it would have been read if the testator had died the moment after he executed it." And that these papers, as probated, according to the authorities, and under the circumstances presented and the wording of the codicil, fall within the exception and not the rule. (See also *Hopwood* vs. *Hopwood*, 7 H. L. C. 740; *Bower* vs. *Bower*, 7 T. R. 482; 2

B. &. P. 500; *Parker* vs. *Briscoe*, 3 J. B. Moore, 24; *Moneypenny* vs. *Bristow*, 2 Russ & Myb. 117; *Ashley* vs. *Waugh*, 4 Jurist, 572; *Kendall* vs. *Kendall*, 5 Munf. Va. 272; *Sidney* vs. *Sidney*, L. R. 17 Eq. 65; *Hughes* vs. *Turner*, 3 Myl. & K. 691; *Smith* vs. *Dearnier*, 3 Younge & J. 277; *Powys* vs. *Mansfield*, 3 My. & Cr. 376.)

4. Even if the will be held to speak from the date of the codicil, the property in question will pass as realty to the devisees. Admitting that, at common law, the contract would have worked a revocation, that common law doctrine of revocation has been cut up by the roots by our statutes and codes. The only other foundation for the contention of counsel is found in the doctrine of equitable conversion; and that rests solely upon the maxim that equity considers that done which ought to have been done. All the cases cited show that this doctrine of equitable conversion goes on the maxim that equity considers that done which ought to have been done, not which might have been done, and as having been done *at the time when it ought to have been done*—not sooner; and that the devise, under the statutes, passes the realty, unless there be shown a contract binding and calling for specific performance at the death of the testator. Moreover, the cases cited are inapplicable to the Canavan property—First, because Canavan never did get the title; and second, because of section 14 of our statute differing as it does from the statutes under which they were decided; and because the Canavan contract was a conditional one, and the conditions never happened until after the acts relied on as working the asserted republication of the will had taken place. No court of equity would have enforced specific performance at any time before Canavan was in default, nor would equity say he ought to have acquired the title or compelled the purchase until the contingencies specified had happened; consequently, in any view, the will antedates the contract as a binding, enforceable contract—antedates any conversion arising from the application of the maxim relied on. (Wms. Exrs., vol. 3, pp. 1861–2, 1863–4; *Brothers* vs. *Cartwright*, 2 Jones Eq. 113; Adams Eq. 297; *Nagle's appeal*, 13 Pa. St. 262; *Anewalt's appeal*, 42 Pa. St. 416; Adams Eq. 288, 136–7; *Evans* vs. *Kingsbury*, 2 Rand (Va.) 120; *Naglee* vs. *Ingersoll*, 7 Pa. St. 197; Bishopham, p. 63; *Jordan* vs. *Cooper*, 3 S. & R. 585; *Constanee* vs. *Bradshaw*, 4 Hare, 315; *Clymer* vs. *Lyetter*, 1 W. Black, 348; *Wall* vs. *Bright*, 1 Jac. & W. 498; Sugden, vol. —, p. 286; *Edwards* vs. *West*, L. R., 7 ch., div. 858; *Emus* vs. *Smith*, 2 De G. & Sm. 735; Dart, vol. & p., 4th ed., 238.) Nothing in the cases cited by counsel con-

travenes this view. They are either cases decided upon the common law doctrine of revocation abrogated by our statutes, or upon the English statute 1 Vict., differing from ours in making the will read as if executed just prior to the death of testator.

6. *Wright* vs. *Minshell*, 72 Ill. 584, holds that where a testator, having contracted to sell all his lands in the county of A, devised all his lands in said county, the testator had the legal title at the time of his death, and the devisee took the purchase money when collected, which was after the death.

J. P. HOGE, Referee:

The parties interested in this estate having submitted to me for my decision the questions involved in the construction of the will of Mr. Satterlee, I have heard the parties, by their counsel, both orally and in writing, upon the questions at issue between the devisees and legatees under the will. The counsel on the one side and the other have cited and commented upon a great number of authorities, all of which I have carefully considered in connection with the provisions of our own statutes bearing upon the questions submitted.

The provisions of the will and codicils, and the facts upon which the questions arise, are stated in the agreed statement of the parties and papers attached which have been submitted to me, and to which reference is made without here repeating them.

The sole question submitted is, how and to whom, under the provisions of the will, is certain real estate belonging to the testator at the date of his will—to-wit, the 12th of October, 1872—or its proceeds to be distributed?

I do not propose to go into an elaborate discussion of the various points and authorities submitted by the counsel of the parties on the one side and the other, but shall very shortly state the conclusions at which I have arrived.

The will, as will be seen, first gives all the personal property to certain of his relatives, naming them; and then, secondly, gives all his land or real estate to the same and other relatives, in certain proportions named. After the date of the will the testator in his lifetime entered into contracts with different individuals for the sale, upon certain terms and conditions, of certain portions of his real estate. One of these contracts, the one with A. Hemme, has been performed since the death of the testator, and the proceeds of the property are in the hands of the executors and trustees for distribution. The other, the contract with P. H. Canavan,

has never been carried out or performed, but all rights of Canavan since the death of the testator have been barred and cut off by a decree of the Fourth District Court.

The testator, by a codicil to his will dated the 6th of April, 1875, revoked and canceled so much of his will as gives any portion of his property to his nephew, George Agnew Satterlee, and gives that portion of his property to the other devisees and legatees named in his will in certain proportions; and on the 12th of May, 1875, the testator revoked, canceled, and annulled the foregoing codicil.

The only question then submitted is, to whom does the real estate mentioned in those contracts go? In other words, is the property to be distributed as personal property or as real estate, and go to the devisees under the will of the real estate of the testator? In my judgment the whole question is governed by the provisions of our statutes. Section 14 of the Act concerning wills, 2 Hittel, paragraph 7339, provides as follows: "A bond, covenant, or agreement made by a testator to convey any property devised or bequeathed in any will previously made shall not be deemed a revocation of such previous devise or bequest, but such property shall pass by the devise or bequest subject to the same remedies on such bond, covenant, or agreement for the specific performance or otherwise against the devisees or legatees as might be had by law against the heirs of the testator if the same had descended to them." Section 22 of the same Act, paragraph 7347, is as follows: "Any estate, right, or interest in lands acquired by the testator after the making of his or her will shall pass thereby in like manner as if it passed at the time of making the will, if such shall manifestly appear by the will to have been the intention of the testator." These provisions of law were in force when the will of Mr. Satterlee was executed. The provisions of the Code afterwards adopted are not materially different. Looking to these provisions of our statute, and applying them to the case in hand and the provisions of the will irrespective of the codicils, there would seem to be no doubt of the true construction of the will and of the intention of the testator. How and to what extent is the construction of the will varied by the codicil of the 6th of April, 1875, and the document of the 12th of May, which revokes and cancels that of the 6th of April?

The argument is that the codicil, being dated and executed after the date of the will, makes that will speak not from its own date, but from the date of the codicil, and as if then executed, and thus withdraws it from the operation of the

statutory provisions. This is by no means the necessary result. On the contrary, as was said by Lord Campbell, in the case of *Hopwood* vs. *Hopwood*, reported in 7 House of Lords Cases, 740: "Though a codicil confirms a will, and for *certain purposes* brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if it had been originally made at the date of the codicil."

The argument is based upon the proposition that the execution of a codicil is a republication of the will, and makes it speak and operate precisely as if it was executed upon the day of such republication. This is altogether too broad a statement of the law when applied to a case like the one in hand, and especially when considered with reference to our peculiar statutory provisions in relation to wills, which in my judgment go much farther than the English statute referred to in the argument. I have found no case, and have been referred to none, in which the doctrine contended for has, for such a purpose as indicated here, been applied to facts like those involved in this controversy. On the contrary, I think an examination of the numerous authorities which have been cited by the learned counsel would lead to the conclusion that no case has yet gone so far as is contended for here. In my judgment the mere execution of these codicils, under the facts before me, does not cut off the rights of the devisees under the will.

The great cardinal canon in the construction of wills is to ascertain and carry out the intention of the testator, if it can be done consistently with the rules of law; and I entertain no doubt in the present instance of the intention of the testator apparent upon the face of his will and its codicils. So far from changing, or intending to change, the direction which he desired his real estate should take under the provisions of his original will, he was confirming, and intending to confirm, all that he had previously done in this regard; and in my judgment there is nothing in this in conflict with the rules of law.

I therefore hold and decide that the property or its proceeds mentioned in and covered by the several contracts made by the decedent in his lifetime with A. Hemme and P. H. Canavan, passed under and by force of the devise in the will to the devisees therein named, and should be administered and distributed by the executors and trustees according to the devises of the will as real estate, and not as personal estate.

SAN FRANCISCO, December 3, 1879.

Legal Facetiæ.

"HAVE you anything to offer the Court before sentence is passed." "No, your Honor; my lawyers took my last $10."

ANECDOTES OF A BOSTON LAWYER.—One occasionally sees the form of the venerable H. W. Paine as he walks with mind absorbed in his work to and from his office and the courts, and is forced to admire and almost love the man from the sweet genial smile which occasionally passes over his features, and from the grave, courteous manner with which he replies to salutations of all who greet him. As a lawyer, particularly in matters pertaining to real estate, he ranks at the head of his profession; and as a man he is chivalrous and generous to the extreme—a perfect "old school" gentleman. It is a pleasure to lawyers and laymen alike to witness him conducting a case; and although his contempt for our Supreme Court is well known, it seldom manifests itself during a trial. Innumerable are the stories told of this contempt. Some years ago he tried a case for a lady client, but did not receive a decision in his favor, although justice and equity would have warranted it. As he and his client were leaving the court-room, the lady, who is well known as the exponent of woman's rights, said to him, "That was rank injustice." "Certainly, madam," Mr. Paine replied. "Mr. Paine," the lady continued, "when we women get a chance to sit on that bench, such injustice will not be possible." With one of his rich rare smiles, the great lawyer said: "Madam, never expect to see a greater set of old women than are at present on the Massachusetts Supreme Court bench." A short time ago, while on his way in the horse-cars to Cambridge, he was observed by one of the younger and lesser lights of the bar, who was acquainted with him, reading a sheep-covered book, and the young man, catching his eye, said: "Ah, Mr. Paine, reading law? I thought you knew the law, and it was for youngsters to study it." Gravely he replied, "I am not reading law; I am reading one of the decisions of the Massachusetts Supreme Court." The best, however, of all, whose accuracy is vouched for by many persons, is a little passage-of-arms between Mr. Paine and the Chief Justice. During a trial Mr. Paine, while calmly arguing a legal point to the full bench, was interrupted by Chief Justice Gray, who said: "Mr. Paine, you know that it is not the law of this State." Without the change of a muscle, without an elevation of his voice, with only a little pallor about the temples to show that he felt the insult, Henry W. Paine said, "I beg your Honors' pardon. It *was* the law in this commonwealth until your Honor just spoke." The emphasis on the "was," the nice discrimination between "your Honors'," the full bench, and "your Honor," who had criticised him, caused the burly Chief Justice's face to assume a redder tint than high living had already implanted on it.

"In re DENIS KEARNEY."

THE WRIT OF HABEAS CORPUS—ITS USES AND ABUSES.

The late decision of the Supreme Court of California in *In re Kearney* is so startling an innovation on established law, and will be so mischievous in its consequences if accepted as authority, that it has justly attracted the attention and called forth the criticism of the judiciary and of the legal profession.

There has seemed to be a disposition of late in the courts of California to turn the writ of *habeas corpus* into a writ of error.

The Supreme Court under our new Constitution consists of a Chief Justice and six associate justices. The decision above referred to received the concurrence of five of the justices, Mr. Chief Justice Morrison and Mr. Justice Myrick dissenting. Mr. Justice McKinstry is responsible for the majority opinion. The opinion is deserving of no particular consideration here, save in so far as I may have occasion to refer to the latter part of it for the grounds on which the judges base their judgment.

The case which was the occasion of the *habeas corpus* in question originated in the Police Court of the city and county of San Francisco. Denis Kearney, of whom most people have heard, was arrested on a legal warrant, issued in due form, on a complaint charging him with the commission of a *misdemeanor*. The allegations of facts charged to constitute the offense will be shown hereafter. Kearney was tried in the Police Court according to the usual and regular practice thereof, and was convicted, and thereupon sentenced to six months' imprisonment and the payment of a fine of a thousand dollars. He thereupon appealed to the Superior Court, in which his case was fully argued and considered, and the judgment of the Police Court affirmed. No appeal on writ of error lay to review the judgment of the Superior Court. Its decision, on appeal from the judgment of the Police Court, under our Constitution and laws, was final. Kearney then petitioned the Supreme Court for a writ of *habeas corpus*. The Court ordered the writ to issue, and made the same returnable before the Judges of the Superior

Court, who heard the case and then remanded the prisoner into custody to undergo his sentence. Thereupon, on a further application to the Supreme Court, it issued another writ, and made it returnable before all the justices in bank. The case was argued several days; the Court took time to consider; and, lo! the result in the decision and opinion referred to, in effect reversing the judgment of the Police Court.

On the hearing, several distinct points were made by the counsel for Kearney. They were all overruled or passed over without notice, except one to which I shall presently call attention, which was sustained, and the prisoner was discharged. For a complete understanding of this point I shall be obliged to go back, and state some matters with greater particularity.

The Police Court of San Francisco is a local court of limited and inferior jurisdiction. This is too apparent to admit of reasonable discussion. It is pretty much the same as the Police Courts and Mayor's Courts in other cities of the United States. Yet a considerable portion of the opinion referred to is taken up with a discussion of the character of the Court in this particular, a question utterly immaterial in respect to the point on which the case was decided, according to the same opinion; for whether the Police Court was one of general or of limited and inferior jurisdiction, is a matter of indifference so long as it had jurisdiction in the particular case both of the subject matter and of the person. The jurisdiction of the Police Court may be represented, in general terms, as confined to petty offenses arising under the statutory laws of the State and under the ordinances of the city and county of San Francisco. It has a clerk, and also a seal. A good deal of the opinion is also made up of a discussion of the settled doctrine that the jurisdiction of courts of the limited and inferior class must appear on the face of their proceedings—a discussion utterly out of place for two reasons: First, because the jurisdiction of the Court did appear on the face of the proceedings; and secondly, because that does not constitute the real ground of the judgment of the Supreme Court. The facts claimed by the prosecution as constituting the misdemeanor were fully set out in the complaint. The misdemeanor which the defendant was charged as having been guilty of was claimed to have consisted in a breach of an ordinance of the city and county of San Francisco.

The charter of the city and county of San Francisco, or what is called the Consolidation Act (Stat. 1861, p. 552),

which lay at the foundation of the ordinance, in the 74th section, declared:

"The Board of Supervisors shall have further power by order or regulation, * * * Eleventh, to determine the fines, forfeitures, and penalties that shall be incurred for the breach of the regulations established by said Board of Supervisors, and also for a violation of the provisions of this Act where no penalty is affixed thereto or provided by law. But no penalty to be imposed shall exceed the amount or value of $1,000, or six months' imprisonment, or both."

This statute was amended in 1863 (Stat. of 1863, p. 540, sec. 1, sub. 3) thus:

"The Board of Supervisors of the city and county of San Francisco shall have power by regulation or order, * * * Third, to prohibit and suppress or exclude from certain limits all houses of ill fame. * * * To prohibit and suppress or exclude from certain limits, or to regulate all occupations, * * * *exhibitions and practices* which are against good morals, contrary to *public order and decency, or dangerous to the public safety.*"

By virtue of this statutory authority, the Board of Supervisors passed an ordinance, No. 497, which was afterwards amended by Ordinance No. 1796, which was designated as Chapter 3, section 1 of this chapter, and declares as follows:

"Any person violating any of the provisions of this chapter shall be deemed guilty of a misdemeanor, and be punished by a fine of not exceeding $1,000, or by imprisonment not to exceed six months, or by both such fine and imprisonment."

Section 28 of this same Chapter 3 then provides: "No person shall * * * Second, utter in the hearing of two or more persons any bawdy, lewd, obscene, or profane language, words, or epithets. Third, address to another, or utter in the presence of another, *any words, language, or expression having a tendency to create a breach of peace.*"

The clause in italics just quoted is the one on which the question of law arises, and on which the case was decided by the Supreme Court. The Court assumes that the Legislature had power, under the Constitution, to pass the statute, and that the Board of Supervisors had power, under the statute, to pass the ordinance. It concedes, for the purpose of that case at least, that the ordinance was reasonable, was duly published, and was in fact a valid ordinance in every respect.

The complaint, after the usual formal allegations of such pleadings in the Police Court, alleged that the defendant,

on a given day and at a certain place in the city and county of San Francisco, "did willfully and unlawfully utter and address to others—to-wit, to a large number of persons then and there assembled, to-wit, one hundred and more persons whose names are unknown—certain words and profane language, which words and language then and there had a tendency to create a breach of the peace." Then follows an allegation setting out the particular words claimed to have been spoken of and concerning a prominent citizen of San Francisco, of the grossest and most slanderous character.

The whole case is now before us. The Supreme Court discharged the prisoner on the simple and sole ground, as appears from their opinion, that the words were not charged, and did not appear *to have been spoken to, or in the presence of, the person who was the subject of them;* that the uttering of them before a large audience, assembled in a public meeting in the city, was no offense within the meaning of the ordinance; and therefore that the Police Court had not jurisdiction of a subject matter on which it could convict the prisoner.

The question of law now appears clearly presented. I shall first state my views of the legal aspect of the case, and shall next consider it in the light of the authorities, assuming for these purposes that the interpretation of the language of the ordinance by the Supreme Court was right, and that of the Police Court was wrong—though, as a matter of legal hermeneutics, I think the Police Court was right and the Supreme Court wrong.

The *habeas corpus* was issued after trial and conviction. In the course of the trial it became the duty of the Police Court to decide the question whether the complaint set forth facts which constituted the offense of *misdemeanor* under the ordinance and the statute; and in so doing it was necessarily called upon to construe the language of the ordinance, that no person shall "*address, or utter in the presence of another, any words, language, or expression having a tendency to create a breach of the peace.*" It did give an interpretation to the language of the ordinance by holding that the same included words concerning another uttered to, and in the presence of, a large concourse of people—whether the person to whom they were applied was present and heard them or not—if they had a tendency to create a breach of the peace. And it further held that the words charged had such tendency. But on this last proposition there is no controversy between the two courts, the Supreme Court impliedly admitting that the language would have been criminal had it been used to, or in the presence of, the person denounced.

Let us now see how we stand. The Supreme Court admits, for the purpose of their decision at least, that the statute of the State giving the power to the Board of Supervisors to pass the ordinance was constitutional; that the ordinance was properly passed by the Board of Supervisors, was properly published as required by law, and was not objectionable on the ground of being unreasonable; that, in fine, it was a legal and valid ordinance, and that a breach thereof would constitute the criminal offense known to the law as a misdemeanor, and that the Police Court had jurisdiction over *misdemeanors created by the ordinance.*

The action of the Supreme Court in discharging the prisoner was rested solely on the ground that the Police Court had misconstrued the ordinance. The question is, was this a proper use of the writ of *habeas corpus?* The Police Court, as conceded by the Supreme Court, had jurisdiction over *misdemeanors* created by the ordinance. What is jurisdiction in its legal acceptance? It is the power *to hear and determine.* The Police Court, then, had power to hear and determine any matter charged before it to be a *misdemeanor* under the ordinance. It had power, consequently, to decide whether such matter was or was not an offense within the purview of the ordinance. It was therefore compelled to give a construction to the language of the ordinance. Such action was within the direct line of its duty on the hearing and determination of the charge. Power to hear and determine implies the power to decide wrong as well as to decide right. It is for this reason that we have appellate tribunals. They are created for the purpose of reviewing the decisions of lower courts in cases where errors have been committed by them in the exercise of their appropriate jurisdiction. Where the appellate power ceases, the power of review likewise ends. This is a rule universally applicable, without exception, in all cases whatever where the lower court has jurisdiction over the subject matter—that is, where it has the power to hear and determine the charge. If the Police Court misconstrued the statute, the remedy, and the only legal remedy, was by appeal—by taking the opinion of a higher court on the question whether the construction of the Police Court was right or wrong. This was done, as above stated, by an appeal to the Superior Court—the highest as well as the only court which, under our Constitution and laws, had appellate jurisdiction over the judgment of the Police Court—as, according to the same Constitution and laws, neither appeal nor error lay to the Supreme Court from the decision of the Superior Court. In the course of appel-

late jurisdiction the judgment of the Superior Court was final. Whether the jurisprudence of the State ought to have provided for a review in such cases by the Supreme Court is not a judicial question. It is sufficient to say that it did not. And there is no more reason in asserting jurisdiction in the Supreme Court to issue the writ of *habeas corpus* because such right of appeal did not exist, than there would be in insisting upon the power of some other officer vested with jurisdiction over the proceeding of *habeas corpus* to discharge a prisoner held by virtue of a judgment of the State Supreme Court, because the system of jurisprudence of our country did not allow of a review of such judgment by the Supreme Court of the United States. On the contrary, the fact of there being no power of review on appeal or error, by one court over the subject matter of the judgment of another court, is always held to be, on a question of correction of judicial errors, a sufficient legal reason why the former court has no jurisdiction by *habeas corpus*. This point has often been decided by the Supreme Court of the United States, and by the highest courts of sister States, and rests on sound sense and a correct appreciation of the nature of our judicial system; for had the legislation, whether of the nation or of the State, intended that one court should have power to annul the action of another court in a matter over which the latter is vested with jurisdiction, it would have authorized the exercise of such power by way of appeal or error or *certiorari*, or in some mode by which the record might be removed into the court of review. It will be observed, of course, that this doctrine is limited, as I have above guardedly expressed it, to those cases in which the original proceeding is in a court which is vested with jurisdiction over the subject matter thereof. If such latter court has no jurisdiction over the subject matter, widely different considerations arise. Then its authority does not extend to "the hearing and determination" of the case. Then it has no more authority to assume to act judicially than any other man or body of men. Then, if it does intermeddle, its action is simply a nullity. Then any officer or court having power to issue the writ of *habeas corpus* may interpose; otherwise such officer or court usurps a jurisdiction which the law does not confer.

To apply this doctrine to the facts before us: The Police Court had jurisdiction in the case; it had the power "to hear and determine." What was it which the Police Court had power *to hear and determine?*" Evidently, the *charge* preferred before it. It had the power *to hear the charge*, to listen

to the evidence for and against the charge, to weigh the same judicially, and thereupon to *determine* whether the charge preferred, if proved, would constitute the offense known to the law as a *misdemeanor* under the ordinance referred to and the statute authorizing the same; and consequently was necessarily compelled to construe or interpret not only the pleading by which the charge was made, but the ordinance and statute by virtue of which it was claimed that the facts charged constitute the offense called misdemeanor. All these questions it was in the direct line of its duty to hear and determine. That was the exercise of jurisdiction—jurisdiction over the subject matter. This power involved, of course, the possibility of deciding erroneously as well as rightly; and such decision must necessarily, from the very nature of our judiciary system, be conclusive and final, unless the power of reviewing the same by appeal, or writ of error, or *certiorari* be intrusted by the Constitution and laws to some other officer or tribunal. No such review is warranted by *habeas corpus*. Possibly the legislative power might authorize such reviews by *habeas corpus*, but it has never done so either in England or in any one of our American States.

I have been thus particular in explaining what I understand by the legal term *jurisdiction* as used in the law of *habeas corpus*, in consequence of the loose and indeterminate sense in which it is scattered about by judges and law authors, as is evident from the opinion of the Court in this Kearney case.

Let us consider for a moment the consequences which might legitimately follow from the decision of the Supreme Court. That Court has no greater power to discharge under *habeas corpus* than any one of the other numerous courts and officers who are authorized to issue the writ. The power of all such courts and officers, including the Supreme Court, is the same in law. The moral weight may be, and doubtless is, greater in some cases than in others, in proportion to the good legal sense and learning and experience of the particular tribunal in every instance. Suppose, then, the Supreme Court in this case had come to the conclusion that the prisoner ought not to be discharged, that this Court had given the same interpretation to the ordinance put on it by the Police Court, what is then to hinder any other inferior court or single officer, on the doctrine of the Supreme Court, from discharging the prisoner on the ground that the construction of the ordinance by the Supreme Court, as well as by the Superior Court and Police Court, was erroneous in the eye of such other court or officer? The writ may be

issued by at least twelve different judicial officers in the county of San Francisco besides the Supreme Court, and by each of the Justices of the Supreme Court independently. Thus there may be at least nineteen judicial officers authorized in such county to issue the writ. Suppose the case had been heard before eighteen of them, who had all agreed in the construction of the language of the ordinance given by the Police Court, the nineteenth of such officers might, if the doctrine of the Supreme Court is correct, take a fancy on a fresh writ issued by him that all the officers before him had placed an erroneous construction on the ordinance, and therefore discharge the prisoner. However unlikely it may be that this precise state of facts will occur, yet they are legally possible under the practice sanctioned by the Supreme Court. What a beautiful system of appellate criminal law that would be!

The result from the foregoing *a priori* reasoning is, that the only instance in which a court or officer can be justified in discharging a prisoner held in execution under a final judgment in a criminal case, who is brought up on *habeas corpus*, is when the tribunal rendering the judgment had no jurisdiction over the subject matter—that is, no power under the law to *hear and determine the criminal charge*—or where no jurisdiction had been acquired over the *person*. I have said nothing touching jurisdiction of the *person*, because, in the case under review, jurisdiction over the *person* was not questioned; it was conceded.

I shall now proceed to a limited examination of the law of *habeas corpus* as gathered from the best and highest authorities. It must be borne in mind that this is a case where the writ was issued to relieve a prisoner after trial and conviction—where the Supreme Court had no *appellate* power—and that no *certiorari* to bring up the record did, in fact, or could legally accompany the writ. In my examination of the case, I have been forcibly struck with the utter confusion of the authorities—contradiction I do not mean—but of the natural distinctions which ought to be observed, as growing out of the nature and condition of the circumstances from which the petitioners in the various cases have claimed that they ought to be set free. Neither courts nor text-writers—as for instance, Hurd—seem to use the terms *jurisdiction*, subject matter, etc., in any definite or determinate sense. No proper distinctions are observed between cases of children, wards, wives, lunatics, prisoners held for the commission of crime, whether before or after preliminary examination, whether before or after trial and conviction. Perhaps no branch of

our law more needs a clear-headed legislator to regulate it, so as to put it in a state in which courts and officers, charged with the duty of executing it, would be capable of understanding it. It is for this reason chiefly that I have been more diffuse in this review than I should otherwise have been.

I think the views above expressed will be confirmed by the general statutory law in the different States. There is a great similarity in the different statutes. In fact, they are substantially the same; and the law of *habeas corpus* is essentially the same in all parts of our country. As, however, the case under review arises in California, I shall refer particularly to the statutes of this State only. The first section on the subject provides (2 Hitt. Codes, Art. 14,473):

"Every person *unlawfully* imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of *habeas corpus*, to inquire into the cause of such imprisonment or restraint."

It will be observed that the person must be *unlawfully* imprisoned or restrained of his liberty, before any court can have authority to inquire into the cause of imprisonment or restraint; and consequently when it is seen, on the return of the writ, that the prisoner is *lawfully* imprisoned or restrained, the court has, by the very words of the statute, no power but to remand. Imprisonment by virtue of an execution issued upon a judgment in a criminal case, rendered by a court having jurisdiction over the subject matter as well as of the person, is *lawful*. It is not *unlawful*. By the natural interpretation of the statute, therefore, no court has power to interfere on *habeas corpus*, if it appear from the return to the writ that the prisoner is held under an execution of a court which has jurisdiction over the *subject matter*—that is, which had the power *to hear and determine* the case. In such case the imprisonment *is not unlawful*.

The officer is required to state in his return, among other things, "the authority and cause of such imprisonment and restraint." (*Id.* Art. 14,475, sub. 2.) And also, if the party is detained by virtue of any writ, warrant, or other written authority, to annex to the return a copy thereof, and to produce and exhibit the original to the court or judge on the hearing of such return. (*Id. ibid*, sub. 3.)

If no *legal* cause is shown on the hearing, the court must discharge the prisoner. (*Id.* Art. 14,485.) If, however, a regular execution be set up in the return and be proved on the hearing, then what the law calls *legal cause* is shown; and

if such execution is supported by *judgment* of a court of *competent jurisdiction*, then the return is *conclusive*.

The statutes of California (*Id.* Arts. 14,466, 14,477), like the statutes of most, and, it is believed, of all the States, requires the court or judge, on the hearing, to remand the prisoner, if it appears that he is detained "by virtue of *the final judgment or decree of any competent court of criminal jurisdiction*, or of any *process* issued upon *such judgment or decree*."

In the principal case, the Police Court was a "competent Court of criminal jurisdiction." It had, by express statute (Stat. 1863, p. 940), jurisdiction of all *misdemeanors* committed within the city and county of San Francisco. Violations of city ordinances are made *misdemeanors* by statute. The Board of Supervisors is empowered by statute to pass ordinances, and to fix the penalties for the violation thereof, "not exceeding six months' imprisonment, or one thousand dollars fine." The Police Court must then have power to *hear and determine a complaint or charge* made before it in due form of proceeding, by which a person is claimed to have done certain acts which are supposed and alleged to be in violation of some ordinance of the city—that is, it must have *jurisdiction* over the *subject matter* in such case. It may decide right; it may possibly, as all other courts may, decide wrong. In neither case does it go beyond its *jurisdiction*. A *wrong* or *erroneous* decision is no more *unlawful* in the legal acceptation of that term in the law of *habeas corpus*, than would be a *right* decision, or one which might be pronounced to be *right* by a court of appeal. Jurisdiction *to hear and determine* charges of the commission of offenses must necessarily be lodged somewhere, and must be final somewhere; and it exists in, and is final in, just such tribunals and officers as the Constitution and statutes have appointed in each particular instance. The jurisdiction over *misdemeanors* for violation of municipal ordinances has been vested by the statutes of California, made in pursuance of the Constitution, in the Police Courts of cities. And these courts consequently have power to decide every question rising in the course of proceedings over which they have jurisdiction; and every such decision is *legal*, and must stand as *lawful* to the end of time, unless reversed by some court having jurisdiction to review and reverse the same. The principal case, therefore, presents the anomaly of a court discharging on *habeas corpus* a prisoner detained on *lawful process*, issued on a *lawful* judgment pronounced by a court having the *lawful* power to pronounce such judgment and issue such process. We have seen that the record of the proceedings and judgment of the

Police Court neither was, nor could legally be, removed by *certiorari*, or otherwise, into the Supreme Court for review. In other words, the Supreme Court had no jurisdiction to review the proceedings, or to reverse the judgment of the Police Court, either mediately or intermediately.

Now, to learn all this law, the Supreme Court need only have looked into the case of *Tobias Watkins*, 3 Pet. 193, a case familiar to every lawyer. The Supreme Court of the United States there says (p. 203): "We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ to liberate an individual from an unlawful imprisonment, the Court could substantially reverse a judgment *which the law has placed beyond their control*. An imprisonment under a judgment *cannot be unlawful*, unless that judgment be *an absolute nullity;* and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous."

In the case just cited, Watkins was convicted of having, as Fourth Auditor of the Treasury, fraudulently obtained and appropriated certain moneys of the United States, and was sentenced to imprisonment, from which he sought to be relieved by *habeas corpus*, alleging the imprisonment to be illegal on the ground that the conviction and judgment was illegal and wholly void on its face, and gave no authority for his commitment and imprisonment; and it was alleged by him, as it is claimed in the principal case, that the indictment did not charge or import any offense. His application was founded, as stated by Chief J. Marshall, "on the allegation that the indictment charges no offense for which the prisoner was punishable in that Court (Circuit Court), or of which that Court could take cognizance, and consequently that the proceedings are *coram non judice*, and totally void." The United States Supreme Court held that the Circuit Court, having jurisdiction of all criminal cases under the laws of the United States, had power to decide *whether the facts alleged in an indictment constituted an offense*, and that its decision could not be reviewed, nor a prisoner held thereunder be discharged, on *habeas corpus*.

The same case further anounces certain principles which lie at the foundation of all administrative laws, and which, though familiar to every lawyer, seem to have been overlooked in the Kearney case: They are: That a judgment, in its nature, concludes the subject on which it is rendered, and pronounces the law of the case; that the judgment of a Court of Record, whose jurisdiction is final, like that of the Superior Court, for instance, on appeal from the Police

Court, is as conclusive on all the world as the judgment of the highest tribunal known to the laws; that it is as conclusive on the highest courts as on the lowest; that it puts an end to inquiry concerning both law and fact, by deciding them finally for the particular case; that a judgment of the lowest court, if it has jurisdiction, has all the obligation which the judgment of any tribunal can have; that, to determine whether an offense *charged* in the indictment is legally punishable or not, is among the most unquestionable of the powers and duties of the Court; that the decision of this last question is the exercise of jurisdiction, whether the judgment be for or against the prisoner; and that the judgment is equally binding in the one case as in the other, and must remain in full force, unless reversed regularly by some superior court having jurisdiction by law to review the same; and that, as the judgment is obligatory, no court can collaterally look behind it; that the question whether any offense had been committed or had not been committed, and whether the indictment did or did not show that an offense had been committed, were questions which the court of original jurisdiction was competent to decide; and that a judgment, though erroneous, was still a judgment, and could not, unless reversed, be disregarded.

These principles are elementary, but they come with greater force when announced by the great jurist, Chief Justice Marshall. They clearly express the gross mistake of the Supreme Court on this *habeas corpus*.

Of like effect is the case *Ex parte Parks*, 93 U. S. 18. The principle here reiterated is, that when an inferior court has jurisdiction of the cause and the person in a criminal suit, and as no writ of error lies from the Supreme Court, the latter Court will not, on *habeas corpus*, review the legality of the proceedings. It is also held that it is only when the proceedings below are entirely void, either for want of jurisdiction or other cause, that relief will be given on *habeas corpus;* and that whether a matter for which a party is indicted is or is not a crime against the laws of the United States, is a question within the jurisdiction of the District Court—the Court in which the indictment was tried—which that Court must decide, and that its decision could not be reviewed by the Supreme Court on *habeas corpus*.

In this last cited case, Parks had been convicted of forgery in the District Court of the United States for the Western District of Virginia, and had been sentenced to imprisonment in the penitentiary. He complained on *habeas corpus* that his conviction was illegal by reason that the act for

which he had been convicted was not a crime against the United States, just as Kearney complained that the charge against him constituted no offense or misdemeanor. Parks was brought out on *habeas corpus* before the Circuit Judge, who, after a hearing, remanded him. Not satisfied with that decision, he applied to the Supreme Court for another *habeas corpus*, just as Kearney, not satisfied with the judgments of the Police Court and of the Superior Court on appeal, and of the same Court again on *habeas corpus*, applied to the Supreme Court for the writ; but, more fortunate than Parks, Kearney was discharged. In the Supreme Court of the United States, in the Parks case, the application for the writ was denied on the grounds, as stated by the Court after a review of the principal authorities, that the Court below had power to determine the question before it, and that no prisoner could be relieved on *habeas corpus* where the Court below had jurisdiction *of the offense*, and did no act beyond the powers conferred upon it. In support of these doctrines the Court cites *Ex parte Lange*, 18 Wall. 163; *Ex parte Kearney*, 7 Wheat. 38; and *Ex parte Wells*, 18 Howard, 307 Prime.

In re Prime, 1 Barb. Sup. C. R. 340, was a case where the writ was issued to relieve from imprisonment under a commitment in proceedings supplementary to execution. The petitioner was refused his discharge on the same ground as in the cases before cited—that the Court by which he was committed had jurisdiction, and that the writ of *habeas corpus* was not the proper proceeding to review the grounds of commitment, but only to decide whether the party was imprisoned without color of law.

The case of *Ex parte McCormack*, 4 Park. C. R. 9, is a case which proceeds on the same grounds, and is equally decisive against the decision in the Kearney case. It is there decided that it is not the province of a writ of *habeas corpus* to review errors or the sufficiency of evidence, but that it is only to ascertain whether there was jurisdiction to pronounce the sentence, and whether the commitment was in due form.

In *The People* vs. *Cavanaugh*, 2 Parker's C. R. 650, the prisoner had been convicted of a misdemeanor, and sentenced to imprisonment in a county jail instead of the penitentiary. He claimed that the judgment ought to have been for his imprisonment, if at all, in the latter, and petitioned for his discharge on *habeas corpus* on this ground. The general term of the Supreme Court, reversing that of the special term, ordered him to be remanded to prison. The Court holds that error committed by a criminal court having juris-

diction of the *offense* and of the person cannot be re-examined on *habeas corpus*, whether the error occurred at the trial or in the judgment rendered, the only remedy being by writ of error or by *certiorari;* and further, that when the imprisonment is under process valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burden of proving its invalidity by showing *a want of jurisdiction;* and further, that error, irregularity, or want of form is no ground for discharging on *habeas corpus*, nor is any defect which may be remedied or amended by further entry or motions; and that matters *anterior to the judgment* cannot be examined under such writ.

In re Harris, 47 Mo. 164, holds that the constitutionality of the law under which a prisoner is held cannot be inquired into on *habeas corpus*. The Court, in its opinion, says: "He (the prisoner) was arrested and detained upon legal process by a court having jurisdiction of the person and offense; he is in custody by virtue of a provision of the law. * * * Admit this proceeding, and then every person charged with committing any offense of any kind or description whatsoever, instead of standing his trial and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he is arraigned. Such a precedent cannot be established, and the Legislature clearly saw the impolicy of the proceeding when it placed a prohibition upon it."

In re Callicott, 8 Blatchford, 89, was a case in which the party had been convicted in the Circuit Court of the United States, and had been sentenced to the penitentiary. It was claimed by him that the statute under which he was tried and convicted had been repealed before sentence had been passed by the court below. The construction of statutes in that case was the legal point on which the case hinged; as the construction of the city ordinance, and of the statute by virtue of which it was adopted, was considered by the Supreme Court in the Kearney case as the only point on which their decision was put. The Circuit Court had jurisdiction of the offense charged in the Callicott case, as it is conceded the Police Court had of *the offense of misdemeanor in* the Kearney case. In the former, the judge before whom the prisoner was brought on *habeas corpus* refused to discharge him. In his opinion Judge Woodruff uses the following language:

"That court (the Circuit Court) had jurisdiction of the matters charged in the indictment, and to determine whether the acts therein alleged constituted an offense against the laws of the United States, and, by the aid of a jury, to try

and determine whether the petitioner was guilty of those acts. *From the judgment of that tribunal no appeal lies to me as Judge. No writ of error lies to me.* And if my opinion was that the learned judges by whom the court was held where the judgment was pronounced committed an error, I have no power to revise or reverse the judgment."

The Judge then goes on with an elaborate examination of the decisions of the United States Courts on *habeas corpus*, showing that no court or judge has power to discharge on *habeas corpus* a prisoner held under the judgment of a court of competent jurisdiction, where no appeal or writ of error lies from the latter court to the former. The language above quoted from the opinion of Judge Woodruff, and in fact the whole opinion, is substantially as applicable to this Kearney case as it was to the case in which it was delivered. The opinion contains a review of, and follows the cases of, *Johnson* vs. *United States*, 3 McLean, 89; *Ex parte Kearney*, 7 Wheat. 38; and *Ex parte Yerger*, 8 Wall. 85.

In the *Matter of Mary Eaton*, 27 Mich. 1, it was decided that a writ of *habeas corpus* will not be granted to review a final judgment for errors when a writ of error lies. The writ was brought to test the sufficiency of the information on which the prisoner was convicted, bearing a striking analogy to this Kearney case in this particular. The court declared that the application was an effort to make the writ of *habeas corpus* take the place of a writ of error, which was not an allowable use of the process. The petition was denied.

Crandall's case, 34 Wis. 177, holds that *habeas corpus* does not lie for mere *error*, however flagrant, but only for *jurisdictional* defects—*i. e.*, when there is the want of any legal authority for the detention or imprisonment—the decision thus running in the groove of all the other authorities. The prisoner was indicted for an assault with intent to kill, but the jury found him "guilty of an assault and battery," and the Court sentenced him to six months' imprisonment and a fine of $500 and costs of the action, and to imprisonment until fine and costs were paid—a punishment which the statute permitted for an assault and battery, but not for a simple assault. And it was held that, even if there was error in convicting of an assault and battery under the indictment, there was still *no jurisdictional defect*, and consequently that *habeas corpus* would not lie. The Court says in its opinion (p. 179): "Nothing will be investigated on *habeas corpus* except *jurisdictional* defects, or illegality, as some courts and authors term it, by which is meant the want of any legal authority for the detention or imprisonment." And

the Court further says (p. 180): "An examination of the authorities cited by counsel for the petitioner shows that there was some *jurisdictional* defect in every case when the writ was allowed. They are like the case put by Mr. Hurd, where he says, 'It would be *illegal* to sentence a man to *imprisonment* for a crime which was punishable by a *pecuniary fine only*.'"

The case of *Semlar*, 41 Wis. 517, holds the same doctrine —to-wit, that *habeas corpus* is not a substitute for appeal or writ of error, and cannot be resorted to for the purpose of reviewing orders or judgments merely erroneous, and made by a court which had *jurisdiction* of the *subject matter* and of the *person*.

The People ex rel. William M. Tweed, 60 N. Y. 559, is a case in which the law of *habeas corpus* is very elaborately reviewed by the Court of Appeals of New York. The Court announced that, where the jurisdiction depends upon certain facts, and the court below has passed upon those facts, its determination is conclusive upon *habeas corpus*; but that, if the record shows that the judgment is not merely erroneous, but is such as could not, *under any circumstances or upon any state of facts*, have been pronounced, a case of want of jurisdiction would appear, and the prisoner be entitled to his discharge.

It appears to me that this doctrine is a correct exposition of the meaning of the word *jurisdiction*, as used in the authorities. This was the well-known case in which Tweed was sentenced, under numerous counts in the indictment, and the Court of Appeals determined that this was *an excess of jurisdiction* which rendered so much of the judgment as was in excess of the power of the Court *void for want of jurisdiction*, on the ground that the Court below had no *power* to impose cumulative sentences exceeding in the aggregate what is prescribed by statute as the maximum punishment for one offense of the character charged. The case was the same, in the view of the Court, as if, on an indictment for an offense punishable at the highest by one year's imprisonment, the sentence should be one of ten years, or for life. Such a sentence, not being within the power of the Court to render, is clearly beyond the *jurisdiction* of the Court, within the meaning of that term, as used in this connection. So in the case before this Court, if the Police Court has not, *in any case or under any circumstances*, the power to render a judgment for the offense of *misdemeanor*, inflicting imprisonment for six months, and a fine of one thousand dollars, then judgment would have been rendered *through want or excess of jurisdiction;* but if the Police Court could, *in any case or under any*

circumstances, upon a charge of *misdemeanor*, render a judgment of fine and imprisonment, then the prisoner could not be discharged on *habeas corpus*. Such is the purport and effect of the decision in the case of Tweed. I refer to the opinions in the Tweed case, and to the case of *The People* vs. *McLeod*, in 1 Hill, 377, and in 25 Wend. 483, and to the note or appendix to the McLeod case, in 3 Hill, 635, for an exposition of the law of *habeas corpus*. See also Hurd on Habeas Corpus, pp. 324 to 369.

The case of *Platt* vs. *Harrison*, 6 Iowa, 79, is in all essential respects like the case under review. The petitioner was imprisoned, in execution of final judgment, for the violation of a municipal ordinance. He sought his discharge on the ground that the City Council had no power to pass the ordinance under which he was convicted. It was held that the Court had no power to examine into the legality of the ordinance on *habeas corpus;* that whether the ordinance was valid or not was a legitimate subject of inquiry by the trial court in the same manner as any other question which might be presented for adjudication, and that it was not a case where the Court had acted without jurisdiction.

I come now to the California Reports. In the case of *Corryell*, 22 Cal. 179, the doctrine of the opinion conflicts with the general rule, and with all previously adjudged cases, and is unquestionably erroneous, and has since been in effect overruled. In that case the indictment under which the prisoner was committed was still pending, undetermined and untried; and the Court in which the indictment was pending was the only proper tribunal to pass originally upon any question arising under that indictment. The case of *Corryell* decides that it is essential to the jurisdiction of the Court that some act known to, and recognized by, the law as a criminal offense, must be set forth in the indictment in order to give jurisdiction to the Court to pronounce judgment in the case, or to try and determine the same; but the question is, who is to decide this? I say, the court of original jurisdiction, and then a court to which an appeal lies, or a writ of error.

The crime charged was forgery in altering, etc., a document belonging to the office of the Secretary of the Senate, and the purport of the decision is that the alteration of no document whatever in the office of the Secretary of the Senate could, however, or in whatever words charged, constitute the crime of forgery under the laws then existing, which was purely a question to be tried and decided in the ordinary mode, as it is always for the Court to decide on the trial

whether the facts charged in an indictment constitute the crime charged in the indictment. The mistake made by the Court on *habeas corpus* was akin to that in this case, with this difference, that in the Corryell case an appeal would have lain from the judgment of the County Court to the court which decided the *habeas corpus*. *Habeas corpus*, however, is not a process by which any court or judge should take a case from any other court or judge having jurisdiction. When the officer or court learns from the return that the case of the prisoner is still pending and undetermined before the court or officer, then the return shows that the prisoner is *lawfully* held. It would lead to the utmost confusion, and bring courts and law into contempt if a contrary doctrine were to prevail. A case, for instance, is pending before the Police Court. It is waiting for trial and undetermined, such court having jurisdiction. The Police Court having power to hear and determine the cause, the law presumes that the court will hear it properly and determine it correctly. Such presumption is as strong, and justly so, as would be the presumption in favor of the decision of an officer or court on *habeas corpus*. While, then, the cause is so pending in the Police Court, we will suppose that some judge or officer or court issues a *habeas corpus*, has the prisoner brought up, and is proceeding to hear the case under the writ. Just then another officer with another writ, issued from some other judge or court, puts in an appearance, and demands the prisoner, and carries him off triumphantly. For if the tribunal which issued the first writ of *habeas corpus* had power to take the prisoner from the court having original jurisdiction, then also the court or officer that issues the second writ may likewise take the prisoner from the tribunal that issued the first writ; and so it might go on through all the officers and courts of the State having power to issue the writ. Now, there are twelve judges of the Superior Court of the city of San Francisco, each of which has jurisdiction over the writ of *habeas corpus*. There are seven judges of the Supreme Court, each of which has the same power. There are two departments of the Supreme

Court, besides the court in bank, each of which courts has the same power, to say nothing of each of the judges of the Superior Court sitting as a separate *court*. Thus there are thirty odd different tribunals in San Francisco vested with power over the writ of *habeas corpus*, and authorized by law to bring before them respectively a prisoner held and about to be tried in the Police Court, each of which, under the decision of the Corryell case, is empowered to take from the other the same prisoner when his case is just ready to come on for a hearing, or when it has been heard and is waiting determination. And the same reasoning applies to a case after trial and sentence, if the decision in the Kearney case is other than an assumption of jurisdiction. It is not probable that the case of any prisoner would run such a gauntlet. But enough has been seen heretofore of the practice in this State to show the possibility of the exercise of such anomalous jurisdiction. The law never contemplated any such use of the writ of *habeas corpus*. It is a violation of the spirit and intent of the law to take by *habeas corpus* the case of any prisoner, from any court while the same is *sub judice*, before it, or after the decision thereof, when no appellate jurisdiction exists. It is an act of disrespect to the court from which the prisoner is taken. Suppose, under the old system, the Supreme Court had a prisoner before it whose case it was just proceeding to hear, and the County Court, which had jurisdiction over the writ of *habeas corpus*, or the judge thereof, should issue the writ to substitute a hearing before itself, in the place of the hearing before the Supreme Court, the County Court or Judge in the case supposed would have had the same power which the Supreme Court now has to discharge a prisoner on such writ while his case is pending and undetermined in the Police Court, or in any other court having power to hear and examine, or to hear and determine. I make these remarks, though not strictly applicable, to the matter now in hand, inasmuch as in this Kearney case a conviction had been had and sentence rendered, and the courts below had become *functus officio*, the matter no longer being *sub judice*; and inasmuch as a wholly

inadmissible practice of the nature mentioned seems to be heedlessly growing up.

In *Ex parte McCullough*, 35 Cal. 97, it is decided that the functions of the writ of *habeas corpus* do not extend beyond an inquiry into the jurisdiction of the Court by which it was issued, and the validity of the process on its face. The Court say, per Sanderson, J. (p. 100):

"The writ of *habeas corpus* has not been given for the purpose of reviewing judgments or orders made by a court, or judge, or officer acting within their jurisdiction. To put it to such a use would be to convert it into a writ of error, and confer upon every officer who has authority to issue the writ appellate jurisdiction over the orders and judgments of the highest judicial tribunals in the land. County Judges, though occupying an inferior position and exercising an inferior jurisdiction, would be, by such a rule, empowered to review and practically reverse the judgments and orders of the District Courts, and of the Supreme Court itself, and also of the Federal Courts exercising jurisdiction within the State. Establish the doctrine that the judgments and orders of courts may be reviewed on *habeas corpus* upon the ground of error, and appeals for the correction of errors may be dispensed with in all cases in which the arrest or imprisonment of persons is allowed. Every criminal action, every civil action, in which an arrest is given, and every proceeding for a contempt, could be brought to the Supreme Court by writs of *habeas corpus*."

In the case of *Ex parte Murray*, 43 Cal. 455, the *habeas corpus* was brought after judgment in the Police Court upon a trial for misdemeanor. The judgment was a fine of $40, and, in default of payment, imprisonment for twenty days. The Court laid down the general principle, that if a court be one of competent jurisdiction to render a final judgment of the character appearing, the court issuing the *habeas corpus* will only inquire if the judgment, as rendered, be upon its face certain and definite in terms, so that it may be known what punishment the prisoner is to suffer. It further decides that the Police Court of San Francisco is not of inferior

jurisdiction in the sense that, upon mere collateral inquiry, nothing is to be intended in support of its judgment. It should be observed that the form of the judgment was simply that of the prisoner had been duly convicted "of the crime of misdemeanor." That is all there is of the description of the offense. Such was the character of the judgment. Such likewise is the substantial character of the judgment in the case of Kearney. In the case of Murray the Court held, in effect, that it could not, in the collateral proceeding of *habeas corpus*, go behind the judgment and inquire into the circumstances which induced it. And the decision was undoubtedly correct.

Ex parte Hartman, 44 Cal. 32, was a case in which it is held that an error committed by the Court in setting aside or modifying an erroneous order in a criminal case cannot be questioned on *habeas corpus*, the order being regular upon its face, and one which the Court had power to make.

To the same effect is *Ex parte Max*, *Id.* 579, overruling *Ex parte Ah Cha*, 40 *Id.* 426.

In *Ex parte Riley*, 2 Pick. 172, the prisoner had been sentenced under a statute imposing a heavier punishment for a second offense. On *habeas corpus* the Court held that it could not on this summary process examine whether the additional punishment was rightly awarded. The prisoner was remanded. He then brought error, and the judgment was reversed.

The cases of *The People* vs. *Shay*, 3 Park. Cr. Rep. 562, holds that a conviction for misdemeanor cannot be reviewed on a return to a writ of *habeas corpus*. The Court of Special Sessions in which the conviction was had was of the same grade in the State of New York as the Police Court of San Francisco in this State. The conviction was for selling liquor without a license. The Court, more particularly, held that where it appears by return to a writ of *habeas corpus* that the prisoner in whose behalf it was sued out is detained by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction, it is the duty of

the officer before whom the writ is returned forthwith to remand the prisoner.

The case of *Ex parte Fisher*, 6 Nebraska, 309, decides the same doctrine so often reiterated in the cases above cited—to-wit, that *habeas corpus* is not the proper proceeding to review a judgment of an inferior court in a criminal action, and that the Court will not upon such writ look beyond the judgment and re-examine the charges on which it is rendered, or the decisions upon the questions of law raised on the trial. The Court says (p. 310): "After judgment and commitment in a criminal action by an inferior court having jurisdiction *of the offense charged*, we think that *habeas corpus* is not the proper mode of procedure to bring the cause into this Court for review upon alleged errors of law."

I have thus reviewed a number of cases from the different States and the United States. The principle is the same in all of them. Though there may be, and necessarily is, considerable diversity in the facts of the different cases, there is none whatever in the law of them, excepting the single case of Corryell. They universally hold that, after judgment in a criminal case of a court of competent jurisdiction, the prisoner cannot be discharged upon *habeas corpus*. I have yet to find one case which holds otherwise. Kearney was convicted in a court of competent criminal jurisdiction, having the same over both the offense and the person. The fact of his having exhausted the right of appeal does not enlarge the capacity of the Supreme Court on *habeas corpus*.

Suppose this application had been made before the prisoner had brought his appeal to the Superior Court, or during the pendency of such appeal, could this Court have discharged him on *habeas corpus?* That would have been a strange proceeding. But this Court has no more power or right to discharge after the decision on such appeal than it would have had before or during the appeal. If the Supreme Court can discharge, then any single officer authorized by statute to issue the writ could likewise discharge; and thus we would in effect have an indefinite number of courts exercising appellate powers by way of *habeas corpus*. The judgment of the

Police Court of matters within its jurisdiction is equally high with the judgment of the Superior Court; and judgments of the latter court would be equally subject to review on *habeas corpus* with those of the former court if the Kearney case is decided correctly.

I am aware that the late Supreme Court did in several cases pass on the constitutionality of statutes and the validity of municipal ordinances on *habeas corpus;* but in none of the cases was objection taken to the form of the remedy. They were all cases where it would seem that the parties interested desired to obtain the opinion of the Supreme Court, and had agreed that no objection should be taken to the mode, or that the mode of presenting the question was agreed upon. Such careless assumption of jurisdiction thus exercised ought not to be allowed to work into precedents or to establish the law.

Since the foregoing was written, another case, on all fours with that of Kearney's, has been on appeal before the same accomplished Judge of the Superior Court who decided the appeal. I refer to the case of *Gannon*, one of the pupils and humble followers at a distance of Kearney. He was tried and convicted in the Police Court for speaking words of similar import with those for which Kearney was convicted, and on a similar occasion. I give in *haec verba* the language of the learned Judge in rendering his decision, as follows:

"Under the decision of the Supreme Court in *Ex parte Denis Kearney*, on *habeas corpus*, the defendant, L. J. Gannon, would be entitled to a discharge on *habeas corpus* on the same or similar reasons which induced the discharge of Kearney by the Supreme Court. Under these circumstances, it would not be advisable to press for an affirmance of the judgment against said Gannon in this case, the District Attorney and the special counsel, however, stating that, in their opinion, the Court is not bound by the decision of the Supreme Court, in the case of Kearney, upon the grounds that the Supreme Court had no power on *habeas corpus* to render the decision it did, and that said decision is against the Constitution of this State, which makes the Superior Court

supreme on matters of appeal in cases of misdemeanor, such as was the matter of Kearney, and that said decision is clearly against the Constitution and laws of the land under the Constitution. This Court states that upon questions, both of public policy and of law, it disagrees with the opinions and the judgment of the Supreme Court in the case of Kearney referred to. This Court, representing the Superior Court of this State, protests against the usurpations of the powers delegated to it by the Constitution. It protests against the writ of *habeas corpus* being turned into a writ of error, and it dissents from the reasoning on conclusions arrived at by the majority of the Supreme Court in the case of Kearney. Still it recognizes, in accordance with suggestions of the counsel, that it would be useless to press this matter further. It would be undignified, and calculated to bring all courts into contempt, for the Superior Court to send this man to prison to-day, and for the Supreme Court to set him free to-morrow. Whatever the law may be, the Supreme Court has the power, and we think it better to free this defendant rather than to invoke a contest between courts which would be injurious to both and to the best interests of society, of which all courts are supposed to be the conservators. Upon the motion of the defendant's counsel, therefore, and with the consent of the attorneys for this Government, it is now ordered that the judgment of the Court below be reversed, and the case dismissed and the defendant go free."

In the views of Judge Freelon thus expressed the entire bar, as I believe, concur.

In conclusion, I think it may confidently be affirmed, in the language of Lord Boughman in another celebrated case, that the decision of the Supreme Court in the Kearney case will "go forth without authority, and come back without respect."

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Current Topics.

THE vindication of Judge Silent, of Arizona, is what was anticipated by those acquainted with the facts. Aside from the personal interest felt in this matter by the Judge and his immediate friends, the whole profession has cause to congratulate itself upon a result which reflects no discredit upon the bench or bar.

IN *Lansman* vs. *Drahoss* (Supreme Court of Nebraska, March, 1880), where S, who was the tenant of certain premises under a lease from L, purchased the same at a judicial sale without surrendering his lease or notifying L who was absent at the time from the State: *Held*, that the purchase could not be sustained, but would be presumed to have been made to protect the interest of L, and that the latter might redeem.

ON page 595 of this number will be found a copy of an Act of Congress, approved January 22, 1880, amending Sections 2324 and 2325 of the Revised Statutes of the United States concerning mineral lands, and furnished the Registers and Receivers, for their guidance, by the Commissioner; and on page 600 will be found a circular letter of the General Land Office, with a copy of an Act of Congress appended, which changes existing laws and regulations relative to the entry of certain classes of lands.

Supreme Court of California.

DEPARTMENT NO. 1.

[Filed July 2, 1880.]

[No. 6501.]

NANCY WAKEFIELD, APPELLANT,
vs.
EDWARD BOUTON, MARGARET F. BOUTON ET AL., RESPONDENTS.

CONFLICT OF EVIDENCE. Where there is a substantial conflict in the evidence, a finding of fact by the lower Court will not be disturbed.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

A. H. Judson, for appellant.
Bicknell & White and *Thom & Ross*, for respondents.

MCKINSTRY, J., delivered the opinion of the Court:

The complaint is for the foreclosure of a mortgage given to secure promissory notes described as follows:

"On the 22d day of April, 1875, in the city of Los Angeles, county of Los Angeles, State of California, the said defendant, Edward Bouton, made his certain promissory notes in writing, bearing date on that day, by one of which notes he promised, for value received, to pay said plaintiff or order the sum of $3,108, in gold coin of the United States, with interest thereon in like gold coin at the rate of one per cent. per month from date until paid, which note by the terms thereof was payable in one year from the date thereof; and by the other note said defendant promised, for value received, to pay said plaintiff or order the sum of $3,108, in gold coin of the United States, with interest thereon in like gold coin at the rate of one per cent. per month from date until paid, which note by the terms thereof was payable in two years from the date thereof."

The complaint alleges that on the 1st day of July, 1876, said defendant paid said plaintiff the sum of $2,544.20 in gold coin of the United States, and the same was then and there, by mutual agreement of plaintiff and defendant, applied on the last described note, which was then and there surrendered to said defendant Bouton; and in lieu thereof, and for the balance due thereon, said defendant made, executed, and

delivered to said plaintiff his certain promissory note for the sum of $1,000, gold coin of the United States, payable to said plaintiff or order in two months from the said 1st day of July, 1876, with interest thereon in like gold coin at the rate of one and a half per cent. per month until paid. Which note it was then and there agreed should be deemed secured by said mortgage.

The plaintiff is still the owner and holder of said first and last described notes and of said mortgage.

That the whole of the principal sums mentioned in said first and said last described notes is unpaid, and no portion of the interest on either of said notes has been paid, and there is now due and unpaid from said defendant Edward Bouton to said plaintiff, on said first note, the sum of $3,108 gold coin of the United States, and interest thereon at the rate of one per cent. per month from April 22, 1875; and on said last described note there is now due and payable from said defendant to said plaintiff the sum of $1,000 gold coin of the United States, and interest thereon from July 1, 1876, at the rate of one and one-half per cent. per month."

The prayer is that the proceeds of sale of the mortgaged premises be applied to the payment of "the amount due the plaintiff," etc.

The answer of the defendant Edward Bouton denies that the payment of $2,544.45 was on the second of the original notes, or that the same was ever surrendered to him, or that it was agreed that the $1,000 note should be secured to be paid by the mortgage.

The defendant Margaret F. Bouton denies that the payment was made on the second note mentioned in the complaint, or that the same was ever surrendered to E. Bouton, or that he in lieu thereof, or for the balance thereon, executed and delivered the $1,000 note. Denies further that on the 1st of July, 1876, or at any time, it was agreed that the $1,000 should be secured by the mortgage. Defendant Margaret F. Bouton, by way of *cross-complaint*, alleges that "on the 1st day of July, A. D. 1876, said plaintiff, for a valuable consideration—to-wit, the payment to her by this defendant of the sum of $2,551.36 United States gold coin—endorsed, assigned, sold, transferred, and delivered the note hereinbefore fully set forth, and which fell due on the 22d day of April, 1877, together with said mortgage, by which the payment of said note was so secured to this defendant, who ever since then has been, and is now, the lawful owner and holder of said last mentioned note and the mortgage, by which the payment of the same is secured as above set forth;

that the whole of the principal sum mentioned in the last described note is unpaid, and no portion of the interest thereon has been paid, and there is now due from said E. Bouton as principal, and said Nancy Wakefield as endorser on said note, the sum of $3,108 gold coin, and interest thereon at the rate of one per cent. per month from April 22, 1875; that this defendant, as the endorsee of plaintiff, holds a prior lien on said mortgaged premises as security for the payment of said last named note and interest, and that the interests of the other parties to this action in said mortgaged premises are all subject to said lien of this defendant."

The third, fourth, fifth, sixth, seventh, and eighth findings are as follows:

"3. That on the 1st day of July, A. D. 1876, and while she was the lawful owner and holder thereof, this plaintiff, for a valuable consideration—to-wit, the payment to her by the defendant Margaret F. Bouton of the sum of $2,551.36, in United States gold coin, which sum was then and there the separate property of said Margaret F. Bouton—endorsed, assigned, sold, transferred, and delivered the second of the hereinbefore described notes—to-wit, the said note which fell due as aforesaid on the 22d day of July, 1877—together with the said mortgage by which the payment of the said note was so secured to the defendant Margaret F. Bouton as her separate estate, who ever since then has been, and is now, the lawful owner and holder thereof."

"4. That the defendant E. Bouton, on the 1st day of July, 1876, executed and delivered to the plaintiff herein his certain promissory note for the sum of $1,000 gold coin of the United States, payable two months after its said date, with interest thereon in like gold coin at the rate of one and one-half per cent. per month until paid, and the payment of the principal sum, or the interest thereon, as mentioned in the said last named note, was not at any time secured either in whole or in part; nor was it ever agreed by or between any of the parties to this suit that the said principal sum, or interest thereon, or any part thereof, should be secured to be paid by said mortgage, or should in any way become a lien upon said mortgaged premises."

"5. That no payment of principal or interest has ever been paid upon either of the aforesaid three notes, and the same remain wholly due, unpaid, and unsatisfied."

"6. That said plaintiff is now the lawful owner or holder of the first of said notes mentioned in the complaint, and which fell due as aforesaid on April 22, 1876, and there is now due and owing to her thereon from the defendant E.

Bouton the sum of $3,108, with interest from April 22, 1875, at the rate of one per cent. per month, all in gold coin."

"7. That there is now due and owing from said defendant E. Bouton, on the second mentioned note described in the complaint, and which fell due as aforesaid on the 22d day of April, 1877, to said Margaret F. Bouton, who is now the lawful owner and holder thereof as aforesaid, the sum of $3,108, with interest from April 22, 1875, at the rate of one per cent. per month, all in gold coin."

"8. That both the principal sum and interest due upon said two last mentioned notes of dates April 22, 1875, are a lien upon said mortgaged premises, and the payment of the same is secured by said mortgage."

These findings are attacked by appellant as not sustained by the evidence. If it were a question of fact to be passed upon by us as an original question, we would entertain doubt whether the plaintiff fully understood the arrangement, and that her endorsement would operate an assignment of the note for $3,108 and *pro tanto* of the mortgage; but the Court below, before whom the witnesses appeared, found in effect that the minds of the parties met, and denied a motion for a new trial. There certainly was a conflict in the evidence, since the witness E. Bouton swore that he explained to plaintiff that his wife, the defendant Margaret F. Bouton, would not advance the money unless the security was transferred to her, and that he would require plaintiff to endorse the note (which she did), so that he could deliver it to Margaret F. Bouton to secure her. The mortgage note was not then due, and the note which he gave for the balance bore one-half per cent. more interest than did the note secured by the mortgage. It has been so repeatedly held that we will not reverse a finding of fact when there is a substantial conflict in the evidence, that it is unnecessary to do more than again to call attention to the rule. What is said above applies to the finding that nothing was paid in satisfaction of the second of the notes secured by the mortgage.

It is urged that the Court below failed to find upon a material issue. The complaint alleges that the $1,000 note was given in lieu of the second note described in the complaint and for the balance thereon, and the answer denied this allegation. It is said the Court found that defendant E. Bouton made and delivered to plaintiff the note for $1,000, but failed to find for what said note was given. But the case shows that $1,000 was (approximately) the balance due upon the note endorsed, and the Court did find that it never was agreed between the parties that the $1,000 note should be

secured to be paid by the mortgage, or should in any way become a lien on the mortgaged premises. It is alleged in the complaint, and not denied in the answers, that the $1,000 note was given for the balance due on the note endorsed. The real issue, therefore, was whether that note was to be secured by the mortgage; and upon that issue the Court found as above stated.

Judgment and order affirmed.

We concur: McKee, J., Morrison, C. J.

IN BANK.

[Filed June 25, 1880.]

[No. 6689.]

BAKERSFIELD TOWN HALL ASSOCIATION, RESPONDENT, vs. CHESTER, APPELLANT.

GIFT OF REAL ESTATE BY PAROL—ADVERSE POSSESSION. (For opinion see 5 P. C. Law Journal, 507.)

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

P. T. Colby, *V. A. Gregg*, and *B. Brundage*, for respondent.
Geo. E. Otis, for appellent.

By the Court:

The application that this case be heard in bank is denied. A gift of real estate may be made by parol, if possession is given and taken under such gift, and acts done by the donee to carry out the purpose of the gift. (*Freeman* vs. *Freeman*, 51 Barb. 306; 43 N. Y. 34.) The donees took possession in November, 1871, and erected the building for the purposes expressed in their agreement, and when the corporation was organized it succeeded to the rights of the donees, thus making the possession for five years from November 9, 1871, adverse to the defendant, and vesting title. The gift, though in form by Baker, was in effect the gift of G. B. Chester and J. Chester as well; it transferred an equitable title from Baker, Chester, and Chester, which would entitle the donees and their successors to have a decree giving them the legal title, or they could, by adverse possession, acquire such legal title.

IN BANK.

[Filed June 21, 1880.]

[No. 7213.]

DESMOND, PETITIONER, vs. DUNN, RESPONDENT.

1. No Act of the Legislature for the incorporation and organization of cities and towns, though constitutional, can have any force or effect within a municipal corporation which was incorporated prior to the adoption of the new Constitution, until a majority of the electors of such corporation vote to accept or organize under it.
2. All provisions of the Constitution applicable to cities are applicable to consolidated governments; those applicable to counties may be applicable to consolidated governments if not inconsistent with the provisions applicable to cities, or prohibited by it to them.
3. Impliedly the Constitution provides that cities incorporated previously to its adoption shall continue to exist under the existing Acts of incorporation, until a majority of the electors determine to be organized under general laws, or frame a charter for their own government; so therefore the Act consolidating the city and county of San Francisco remains in full force and effect.
4. The said Consolidation Act is not inconsistent with Section 7 of Article XI of the Constitution, making provision for two Boards of Supervisors. That clause has reference to general laws passed or charters framed for the government of cities subsequently to the adoption of the Constitution.
5. The "McClure Charter," by its terms, excludes from its operation all corporations for municipal purposes, except those which may be composed of cities and counties merged or consolidated into one government. It is therefore not "general," and is unconstitutional.
6. The said Act does not provide for the incorporation of all merged governments, but is restricted in its application to such governments as contain more than 100,000 population. It is therefore not general, and is unconstitutional.
7. The said Act does not provide for the incorporation of all corporations for municipal purposes. It is therefore not general, and is unconstitutional.
8. Any general law must be as broad as the subject matter to which it relates.
9. There can be no proper classification of cities and counties except by population.

Petition for writ of mandate.

H. G. Platt, for petitioner.

W. T. Baggett and *Greathouse & Blanding*, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The plaintiff alleges that on the 1st day of June, 1880, he presented to the defendant, who then was, and still is, the Auditor of the city and county of San Francisco, for allowance, a demand on the treasury of said city and county, which it was the duty of said Auditor to allow under an Act

of the Legislature, entitled "An Act to provide for the organization, incorporation, and government of merged and consolidated cities and counties of more than 100,000 population, pursuant to the provisions of Section 7, Article XI, of the Constitution of this State. Approved April 24, 1880." The defendant refused to allow said demand, and the plaintiff applied for and obtained from this Court an alternative writ of mandamus to the defendant, requiring him to allow said demand, or to show cause for not doing so. The defendant answered by alleging that the Act under which the plaintiff presented his demand for allowance is unconstitutional, and that it was not the duty of defendant, as Auditor aforesaid, to allow any claim or demand thereunder.

The Act in question is commonly known as "The McClure Charter," and it will be so designated in this opinion. Although there is but one section of that charter which purports to be in force at this time, we shall base our decision upon grounds which will apply to the entire Act. If Section 5 is unconstitutional or inoperative, it is so by reason of the whole Act being so.

The first question which we shall consider is this: If the McClure Charter be constitutional, can it have any force or effect within a municipal corporation which was incorporated prior to the adoption of the Constitution, until a majority of the electors of such corporation vote to accept or organize under it? Section 6 of Article XI provides that "cities and towns heretofore organized or incorporated may become organized under general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws." Both of these clauses plainly refer to charters which may be framed by authority of the present Constitution, and the latter clause is expressly limited to charters so framed. Neither applies to charters existing before the adoption of the present Constitution, except by implication. All such charters remain in force until a majority of the electors of any corporation having a charter determine to become organized under general laws, or frame a charter for their own government. These are the only provisions which are expressly made applicable to cities incorporated previously to the adoption of the Constitution; and the first expressly provides that any of such cities may become organized under general laws whenever a majority of the electors of such city shall so determine, and the other

that any charter framed or adopted under the present Constitution shall be subject to and controlled by general laws. But charters not framed or adopted by authority of said Constitution need not be subject to or controlled by general laws. Therefore the charter of the city and county of San Francisco, which antedates the present Constitution, and was not framed or adopted by authority of it, is not subject to or controlled by general laws. From which it follows that if the McClure Charter falls within the term "general laws," it cannot have any force or effect within the city and county of San Francisco until a majority of the electors thereof so determine in the manner provided in the Constitution, unless there be some other provision of the Constitution which gives force and effect to said charter without such determination of a majority of the electors.

As these two clauses are the only ones which expressly refer to cities which had charters before and at the time of the adoption of the Constitution, and as many of the other provisions of the Constitution unmistakably refer to charters to be framed or adopted after the adoption of the Constitution, it is clearly our duty, upon well-established principles of construction, to hold that any general provisions which seem to conflict with these special provisions were intended to apply to charters framed subsequently to the adoption of the Constitution. (Dwarris on Statutes, 765; Cooley's Const. Lim. 63; *Commonwealth* vs. *The Council of Montrose*, 52 Pa. St. 391; *Wise* vs. *Button*, 25 Wisconsin, 109.)

To the foregoing views one objection is raised, which is not wholly devoid of plausibility. It is that the cities mentioned in Section 6 are corporations other than consolidated cities and counties, and that therefore the provisions of that section do not apply to the city and county of San Francisco. It seems to us, however, that there is a clause in Section 7 which wholly obviates this objection. It reads as follows: "The provisions of this Constitution applicable to cities, and also those applicable to counties, so far as not inconsistent or not prohibited to cities, shall be applicable to such consolidated governments." The meaning of this plainly is, that all the provisions of the Constitution applicable to cities shall be applicable to consolidated governments; and all the provisions applicable to counties shall also be applicable to such consolidated governments, except such as are inconsistent with the provisions of the Constitution applicable to cities or prohibited to cities; which indubitably makes all the provisions of the Constitution which are applicable to cities likewise applicable to consolidated governments,

although provisions applicable to counties may also be applicable to such consolidated governments if not inconsistent with the provisions of the Constitution applicable to cities or prohibited by it to them. This strikes us as being such a complete answer to the objection above stated as to render it unnecessary to suggest any other.

Our first conclusion therefore is, that the McClure Charter, if constitutional, cannot take effect as to the corporation known as the City and County of San Francisco until a majority of the electors of said corporation voting at a general election shall so determine.

On the argument it was insisted that the consequence of this would be to leave said city and county without any government after the first of next month. This suggestion would be entitled to some weight if the language of the Constitution on this point were so ambiguous as to leave room for doubt as to the intention of its framers. In the absence of any such doubt, however, our decision upon the proper construction of the Constitution cannot be influenced by what may be the consequences of a proper construction. But there is no ground for any alarm. Impliedly the Constitution provides that cities incorporated previously to its adoption shall continue to exist under their existing Acts of incorporation until a majority of the electors determine to be organized under general laws, or frame a charter for their own government. The argument that the existing charter must cease after the first of next month, because it is inconsistent with the clause of Section 7 of the Constitution, which provides that "in consolidated city and county governments of more than one hundred thousand population there shall be two Boards of Supervisors or Houses of Legislation," is based upon what we conceive to be a very narrow view of the provisions of the Constitution, because if the Constitution has provided, as we think it has, by necessary implication, that the present charter shall remain in force and effect until superseded or supplanted by one framed and adopted in accordance with the provisions of the Constitution, then no provision of the present charter can be justly said to be inconsistent with any provision of the Constitution. The clause relating to two Boards, or Houses of Legislation, has reference to general laws passed or charters framed for the government of cities subsequently to the adoption of the Constitution. Otherwise, cities previously incorporated might, by the neglect of the Legislature to pass general laws, or of the people to frame charters for their government, be left without any government after the first of next month. If the

existing government of cities, or of consolidated cities and counties, expire on the first of July, 1880, the framers of the Constitution could not have overloked the contingency which might arise by which such municipalities would be wholly without governments after that date. And if they foresaw it, as they must have foreseen it, if it can arise, they would have provided against it. We certainly could not, upon a clause of doubtful meaning, hold that the Convention intentionally or heedlessly paved the way for the introduction of "disorganization and chaos;" or that it intended to deprive any municipality of all government unless such municipality should frame a charter for its own government, or organize under general laws which might be obnoxious to a majority of its electors, within an unreasonably short period. "When the Legislature means to invade previously invested rights, to disregard the public interest, and endanger the peace of the commonwealth, its intention must be expressed in terms free from all ambiguity." (*Packer* vs. *S. and E. R. Co.*, 19 Pa. St. 211.)

The conclusion atwhich we have arrived is, that the Act of incorporation of the city and county and county of San Francisco, commonly known as "The Consolidation Act," is within the first and not within the last clause of section one of the Schedule to the Constitution. And we base this conclusion upon what we conceive to have been the intention of the framers of the Constitution, as we gather it from the language of the instrument itself. To us the general intention to emancipate municipalities, as far as it consistently could be done, from the control of the Legislature, is apparent; and we cannot hold that general laws for the government of such municipalities can take effect in any of them, until a majority of the electors so determine, without violating not only the spirit, but likewise the plain letter of the Constitution. The intention being clear, it is our duty to give effect to it.

But it is claimed on behalf of the defendant that the Act is unconstitutional. The importance of having that question determined is not wholly obviated by the conclusion above announced. Is the Act known as "The McClure Charter" a general law, or does it fall within the definition of "general laws" as that term is used in the Constitution? By the terms of the Act itself it is limited in its operation to consolidated cities and counties of more than 100,000 population. Any city and county government of more than 100,000 population heretofore merged, consolidated, incorporated, and organized, or which may hereafter become so, must be or-

ganized, incorporated, and governed by and under "The McClure Charter," if it be constitutional. Does this Act fulfill the requirement of Section 7, Article XI, of the Constitution, that such consolidated governments "may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes?" Is this a general law "providing for the incorporation and organization of corporations for municipal purposes?" It does not purport to be. By its very terms it excludes from its operation all "corporations for municipal purposes" except those which may be composed of cities and counties merged or consolidated into one government. That this is in direct contravention of the Constitution does not admit of any doubt. And for the purpose of arriving at the intention of the framers of that instrument, Sections 6 and 7 of Article XI must be read together. The former provides that "corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed." Then follows the clause in which provision is made for cities, etc., previously organized.

The obvious meaning of the first two clauses of Section 7 is that city and county governments may be merged and consolidated into one municipal government, and may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes. All the provisions of the Constitution applicable to cities are applicable to such consolidated governments; and all the provisions applicable to counties which are not inconsistent with the provisions of the Constitution applicable to cities or prohibited to them, are likewise applicable to such consolidated governments. This evidently contemplates the enactment of general laws providing for the incorporation and organization of all corporations for municipal purposes, and not for the incorporation and organization of *some* corporations for municipal purposes. And city and county governments, when merged, etc., may not be incorporated under general laws providing for the incorporation of *consolidated* city and county governments for municipal purposes, but under general laws providing for the incorporation and organization of *all* corporations for municipal purposes. How far this Act falls short of that requirement can be seen at a glance. (84 Ill. 590; 83 *Id.* 585; 82 *Id.* 472.)

It is urged that the Legislature had the power to classify

cities and towns in proportion to population, and that the laws enacted for the government of any one class would be general. But we look in vain in this Act—and our attention has not been directed to any other—for the classification of cities and towns in proportion to population. That classification cannot be made on any other basis than that of population. And for the purposes of classification, no distinction can be made between a corporation consisting of a simple city and one consisting of a city and county merged into one government, if the population in each is the same. Therefore the Act, which expressly applies to the latter only, does not apply to a class, and is not general, even in the sense contended for.

The Act under consideration is not only limited to municipal corporations of more than one hundred thousand inhabitants, but also to those composed of *cities and counties* containing that population. The Constitution nowhere confers the power to classify in that manner. A city, pure and simple, of more than one hundred thousand inhabitants, could not become organized and incorporated under this Act; and yet it is expressly provided that cities shall be classified in proportion to population, and that the provisions of the Constitution applicable to cities shall be applicable to consolidated cities and counties, and that the latter "may be incorporated under general laws providing for the incorporation and organization of corporations for municipal purposes," and impliedly not otherwise.

With these provisions before us it would be manifestly absurd to hold that a consolidated city and county could be incorporated under a "general law" that a city of equal population could not be incorporated under for "municipal purposes."

But if the Constitution sanctioned a classification, by which municipal corporations formed by the consolidation of cities and counties might be classified separately from those not consolidated, this Act does not attempt to classify the former, nor is it general as to them. It applies exclusively to corporations of that character which have a population of more than one hundred thousand. Those having a less population are altogether left out; so that this Act does not provide—first, for the incorporation of all corporations for municipal purposes; nor, second, for the incorporation of all cities and towns; nor, third, for the incorporation of all city and county governments which have been, or may hereafter become, merged and consolidated into one municipal government.

From which it is apparent that this Act is repugnant to the rule which requires that any general law must be as broad as the subject matter to which it relates. This is not broad enough to cover all municipal corporations, nor even those consisting of cities and counties merged and consolidated into one municipal government.

Some cases have been cited to show that a law which applies to a particular class of things is sufficiently general to meet the requirements of the Constitution. But this Act only applies to a part of a class under the classification authorized by the Constitution. In *Commonwealth* vs. *Patton*, 88 Pa. St. 258, it was held that there could be no proper classification of cities and counties except by population. Manifestly not where the Constitution provides that they shall be classified in proportion to population.

Having arrived at the conclusion that the entire Act is unconstitutional, it is unnecessary to examine particular sections of it for the purpose of determining whether some of them would not be, even if the Act generally were otherwise.

It follows that the alternative writ of mandamus issued in this case must be dismissed, and it is so ordered.

We concur: McKinstry, J., Thornton, J., McKee, J.

(Morrison, C. J., and Ross, J., were not present at the argument.)

CONCURRING OPINION.

I concur in the judgment and in the views expressed in the opinion written by Mr. Justice Sharpstein, save as to the conclusion reached in the latter part of the opinion that the entire Act is unconstitutinnal; as to that I express no opinion. In regard to the other points referred to in the opinion, I think that the Constitution directly in two instances, impliedly in one, has placed before the people of the city and county of San Francisco three courses, either of which may be pursued, viz.:

1. They may, under Section 8, Article XI (as has been done), elect fifteen freeholders to frame a charter, such charter when framed to be submitted to the people, and if ratified, to be submitted to the Legislature for its approval or rejection as a whole, without amendment. If ratified and approved, it will supersede any existing charter.

2. If the Legislature has or shall pass a general law providing for the incorporation, organization, and classification, in proportion to population, of cities and towns, they (the people of the city and county of San Francisco) may determine to become organized under such general law whenever

a majority of the electors voting at a general election shall express their wish so to do.

3. By non-action—that is, by failing to pursue to the end either of the courses above indicated—they may retain and act under their present charter (known as the Consolidation Act), except as to such parts as are in conflict with the Constitution—viz., method of street improvements and the like.

MYRICK, J.

DEPARTMENT NO. 1.

[From the Bench, May 24, 1880.]

[No. 6855.]

D. DONNELLY, RESPONDENT,

vs.

E. S. POTTER, APPELLANT.

CONTESTED ELECTION. Only qualified residents can vote.

Appeal from the County Court of Amador County.

Eagon & Philips, for respondent.

Farley & Porter and *Young & Young*, for appellant.

After argument, the Court—This is a case of contested election. The position of appellant, as stated by his counsel, is: "The Court below found, at folio 44, that Potter and Donnelly each received 599 votes; at folio 46 that three votes should be deducted from Potter, which left the vote standing, 596 for Potter and 599 for Donnelly. Two of the three votes thus deducted—Hines and Askwith—we claim, as hereinbefore, ought to have been counted for Potter, thereby giving him 598, and the vote at folio 74 ought to be deducted from Donnelly and added to Potter, which would make the vote stand, finally, for E. S. Potter 599 votes, D. Donnelly 598 votes; and this view, we think, is fully and clearly sustained by the authorities."

The evidence, as presented in the record before us, sustains the finding of the Court below that neither Hines nor Askwith was a qualified resident.

Their votes were, therefore, properly deducted from the count for appellant.

Assuming the statement of counsel to be correct in other respects—and we agree that the ballot mentioned at folio 74 of the transcript should not have been counted for respondent, and ought to have been counted for appellant—the vote would stand: For respondent, 598; for appellant, 597.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed June 22, 1880.]

[No. 6701.]

TRACY, APPELLANT, vs. CRAIG, RESPONDENT.

(For a syllabus of the principle involved in this action, see *Tracy* vs. *Colby*, 5 Pac. Coast Law Journal, 534.)

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Stetson & Houghton and *Geo. E. Otis*, for appellant.

S. L. Cutter, *V. A. Gregg*, and *R. S. Arick*, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an action to have the sale of a portion of the estate of Thomas Baker, deceased, set aside upon the same grounds as were alleged in *Tracy* vs. *Colby*, No. 6702, for setting aside the sale of another portion of that estate. The plaintiffs in both cases are the same, and Colby, the County Judge and *ex officio* Probate Judge of Kern County, is a defendant in each case. In this case it is alleged in the complaint that defendants Craig and Jewett bid off the premises at the administratrix's sale (which the plaintiffs seek to avoid) for themselves, Colby, and Sinclair jointly. After the sale, confirmation, and conveyance to defendants Craig and Jewett, they conveyed to each of the other defendants an interest in the land so purchased at said sale. Whether or not, as between defendant Colby and the other defendants, or any of them, there was any agreement or understanding, prior to the confirmation of the sale to Craig and Jewett, that Colby should have an interest in the land so purchased at the administratrix's sale, is the real point in controversy. The plaintiffs allege in substance that at some time before the administratrix's sale took place, the defendants had arranged among themselves that the real property described in the complaint should be purchased at the administratrix's sale by some one or more of their number, and thereafter held and disposed of for the common benefit of all of them. The defendants Craig, Colby, and Sinclair answer jointly, and deny that Colby had any interest, or that there was any agreement or understanding between him and the other defendants, or any of them, that he should have any interest in the land bought at said administratrix's sale until after the confirmation of said sale.

The defendant Jewett filed a separate answer, in which he

denies "that he fraudulently conspired and contrived with his co-defendants herein, or with any of them, for the purpose of defrauding," etc., and denies that he "made fraudulent or any arrangements, as alleged in the complaint, or any fraudulent or any arrangements whatsoever in fraud of the rights of said estate," and much more to the same effect.

The vice of his answer is that he nowhere unqualifiedly denies that there was an agreement or understanding between the other defendants and Colby, prior to the confirmation of the sale, that he should have an interest in the land purchased at said sale. But his answer was not demurred to, nor was there any motion for judgment upon the pleadings as to him. On the other hand, the case was tried as if he, like the other defendants, had sufficiently denied that allegation of the complaint. The findings and judgment of the Court were in favor of the defendants generally. But it was error for the Court to find in favor of defendant Jewett upon an allegation of the complaint which he did not deny. Jewett was called as a witness on behalf of plaintiffs, and gave some testimony tending to prove that he and the other defendants had been jointly interested in land purchased at a foreclosure sale, and also in land purchased at an administratrix's sale of the Baker estate. As the two transactions seemed to be connected, we think that plaintiffs were entitled to have answers to the following questions, to which objections were made by defendants and sustained by the Court, viz.:

"Did Mr. Sinclair, one of the defendants, purchase land at that foreclosure sale?"

"Did F. W. Craig and P. T. Colby, pursuant to the agreement you have testified to, make purchases of land at the foreclosure sale held in June, 1874."

"Was there at any time an arrangement or agreement or understanding between yourself and defendants Craig, Sinclair, and Colby, or any one of them, that you and Mr. Craig should purchase in the lands at the administratrix's sale purchased by yourself, defendants Craig, Colby, and Sinclair, at the mortgage sale, in the interest of yourself, defendants Craig, Colby, and Sinclair?"

"Has any of the lands purchased by you or Mr. Craig at said administratrix's sale been by you or Craig sold to any other parties?"

"Have you at any time since the administratrix's sale, and before the deeds of December, 1877, offered in evidence were made, had any conversation with defendants Colby, Craig, and Sinclair, or either of them, relative to the manner in

which the land described in the complaint was held by you and them?"

"What do you mean by saying that the purchase made by Mr. Colby of the lands in suit was subsequent to the confirmation of the probate sale? Do you mean that a contract of purchase was made, or simply that a conveyance was made by you to Colby?"

The plaintiffs excepted to the rulings of the Court in sustaining defendants' objections, and we are satisfied that said rulings were erroneous. All questions which were calculated to elicit answers which would throw any light upon the transactions of the defendants in regard to the lands involved in the action should have been allowed.

Our views upon the main question involved in the case were expressed in *Tracy* vs. *Colby*, before referred to in this opinion; and it is unnecessary to repeat them.

Judgment reversed, and cause remanded for a new trial.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed June 30, 1880.]

[No. 6405.]

GRUM, APPELLANT, vs. BARNEY, RESPONDENT.

SALE—DELIVERY AND CHANGE OF POSSESSION. Where the Sheriff, by virtue of an execution, levies on certain property as belonging to the judgment debtor, the plaintiff, in an action to recover the same, if he claims to have purchased from the judgment debtor, need not in the first instance prove an immediate delivery and continued change of possession; but when the judgment, execution, and levy has been proved, together with the fact that the judgment debtor was the former owner, the plaintiff must show such delivery and possession.

Appeal from the District Court of the Sixth Judicial District, Yolo County.

Lambert & De Witt and *J. C. Ball*, for appellant.

C. P. Sprague, *W. B. Treadwell*, and *R. P. Davidson*, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

The plaintiff avers that on a certain day he was the owner and in possession of certain personal property, and that so being the owner and in possession the defendant wrongfully took the same, etc., and has ever since withheld, etc. De-

fendant denies that plaintiff is, or was at the times mentioned in the complaint, the owner or entitled to the possession, and alleges one Lambert was the owner and in possession; that one Asberry recovered a judgment against Lambert; that an execution was duly issued thereon and placed in the hands of defendant (alleged to be Sheriff), who levied on the property to satisfy the execution, etc.

The defendant was not bound to anticipate the case of the plaintiff, nor to assume that he claimed as vendee from Lambert, or that he would be willing to admit at the trial that the latter had ever owned the property. It was for plaintiff to deraign his title at the trial. He might prove it *prima facie* by showing that it was taken out of his possession, or prove it fully by showing that he derived from some other paramount source. If he claimed to have purchased from the alleged judgment debtor, it would not be necessary in the first instance to prove an immediate delivery and continued change of possession (if the law as between vendor and vendee had been complied with), unless he chose to admit the judgment, execution, and levy. If the property was taken from Lambert, the defendant would not be called on to show either the judgment, execution, or levy, until plaintiff had established his purchase from the judgment debtor. When Asberry was shown to be a judgment creditor, and the other facts connecting the Sheriff with the property were proven, it became necessary for the plaintiff, as vendee from Lambert, to prove an actual delivery and continued change of possession. But the judgment, execution, and levy having been proved, together with the fact that Lambert was the former owner, plaintiff was *not the owner*, unless the sale to him had been accompanied with an immediate delivery, and was followed by an actual and continuous change of possession. These would be probative facts, tending to prove his averment of owership; and when defendant denied plaintiff's ownership, and averred the other matters alleged, he averred all that was necessary to make up the material issues.

The only actual occupant of the Lambert ranch for a considerable period of time prior to the alleged sale of the personal property upon it was the plaintiff. There was no apparent change in the mode or manner of his occupation when, by the arrangement between Lambert and himself, plaintiff ceased to be the servant of Lambert and became his lessee. Under the circumstances, we cannot say that the Court below erred in granting a new trial.

Order affirmed.

We concur: McKee, J., Ross, J.

DEPARTMENT No. 1.

[Filed July 2, 1880.]

[No. 6575.]

BUSTAMENTE, APPELLANT, vs. STEWART, RESPONDENT.

ATTORNEYS' FEES IN INJUNCTION PROCEEDINGS. The amount of attorneys' fees recoverable in an action upon an injunction bond is limited to fees paid counsel for procuring the dissolution, and not for defending the entire case; and unless it be found what was the distinct charge for services in procuring the dissolution, even nominal damages cannot be allowed.

Appeal from the Superior Court of Colusa County.

McConnell & Paris, for appellant.

Byron Waters, for respondent.

ROSS, J., delivered the opinion of the Court:

This is an action upon an injunction bond given in a suit brought by a certain Colony Association as plaintiff, against these plaintiffs and others as defendants, to recover damages for an alleged trespass upon certain lands, and praying also for the issuance of an injunction restraining the defendants from the commission of certain acts complained of. In that action the defendants were, by an order of the Court, enjoined from the commission of those acts. The injunction was finally dissolved, and the present plaintiffs sue to recover damages alleged by them to have been sustained by the wrongful issuance of the injunction.

After trial had, the Court below found that the plaintiff sustained no damage by reason of the restraining order, except to the extent of the payment by them of attorneys' fees in the action. The Court below also found that these fees were paid by each of the plaintiffs contributing a certain *pro rata* share out of his separate individual funds, and hence concluded that the plaintiffs had sustained no *joint* damage, and for that reason could not recover anything in this action.

It will not be necessary for us to say whether or not we agree with the lower Court in its view upon that question, since it is also found as a fact that the fees paid the attorneys in the case were paid under an agreement providing for the payment of a gross sum for services rendered in the entire litigation, both in the District and Supreme Courts, and upon the merits of the whole controversy. No distinct charges were made for services in procuring the dissolution of the restraining order, and no attempt was made to show what such services were worth.

We understand the law to be as stated by Mr. High in his work on Injunctions: "A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction may be recovered in an action upon the bond, if the injunction was improperly or wrongfully issued, *the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the entire case.*" (High on Injunctions, Secs. 973–4, and cases there cited.)

At the argument of this cause it was contended by counsel that the plaintiffs were at least entitled to nominal damages. If, notwithstanding the finding referred to, counsel are correct in this position, we think we are justified in invoking the maxim, "*De minimis non curat lex.*" (*Wilson* vs. *McElvoy*, 25 Cal. 174; *McConihe* vs. *N. Y. & E. R. R. Co.*, 20 N. Y. 495; *Jenning* vs. *Loring*, 5 Ind. 250.)

Judgment and order are affirmed.

We concur: McKinstry, J., Sharpstein, J., Morrison, C. J.

IN BANK.

[Filed June 15, 1880.]

[No. 6707.]

ALDRICH, APPELLANT, vs. WILLIS, RESPONDENT.

GUARDIAN AND WARD. Former opinion explained.

[The opinion of Department No. 1 in this case, delivered upon the first hearing, will be found at page 513, vol. 5, of this Journal.]

Appeal from the Eighteenth District Court, San Bernadino County.

J. D. Boyer, for appellant.

C. W. C. Rowell, for respondent.

THORNTON, J., delivered the opinion of the Court:

The petition for a rehearing before the Court in bank in this case is denied.

The second paragraph of the opinion of Department No. 1 is in these words: "Nevertheless, Henry M. Willis was a trustee holding the moneys of the infant, Amelia, Jr., which came into his hands in trust for her. The mortgage executed by him to secure such moneys was altogether for her benefit, and the fact that it is set up in her answer by her *guardian ad litem*, and relied upon *(and proved)* herein, constitutes sufficient proof of delivery to and acceptance by her." To which we desire to add, "and this must be so, since if it

(the mortgage) had not been for the benefit of the infant, the Court below, it must be presumed, as it had control over the conduct of the *guardian ad litem*, would not have allowed him to set it up." (Story's Eq. Jur., secs. 1349–1353 inclusive; *Sanford* vs. *Head*, 5 Cal. 297; *People* vs. *Houghtaling*, 7 *Id.* 348; *People* vs. *Davidson*, 30 *Id.* 379; *Dougherty* vs. *Creary*, *Id.* 290; *Joyce* vs. *McEvoy*, 31 Cal. 279 *et seq.*)

The words "*and proved*," in parenthesis in the above quoted paragraph, are inserted by us to indicate the proper construction of the former opinion.

We are further of opinion that the facts as found shew that the mortgage, as taken, was in exact compliance with the terms of the will, and in that view a voluntary acceptance by the infant was unnecessary, since the law compelled her acceptance. She takes under the will, and is bound by its terms. (*Morrison* vs. *Bowman*, 29 Cal. 346.)

Whether Henry M. Willis was guardian or not we consider immaterial. The same result follows whether he (Willis) was or was not the general guardian of the infant, Amelia Willis.

We concur: Sharpstein, J., Myrick, J., McKee, J., McKinstry, J.

DEPARTMENT No. 1.

[From the Bench, May 19, 1880.]

[No. 6967.]

J. L. POULSON, RESPONDENT,
vs.
R. HOSKINS, APPELLANT.

BREACH OF CONTRACT.

Appeal from the District Court of the Tenth Judicial District, Colusa County.

Hart & Hart, for respondent.
Marshall, Craig & Grant, and *Jackson Hatch*, for appellant.

(No attorney appearing for appellant, counsel for respondent presented the case to the Court.)

Counsel for respondent—The complaint in this case is for breach of contract. (Reads complaint.) There was no demurrer. The evidence is stricken out, and there is no record of the instructions.

The Court—Judgment and order affirmed.

Department of the Interior.

GENERAL LAND OFFICE,
WASHINGTON, D. C., March 3, 1880.

Registers and Receivers, United States District Land Offices:

GENTLEMEN—The following Act of Congress, approved January 22, 1880, is furnished for your official guidance, and for the information of those interested.

Very respectfully,
J. M. ARMSTRONG,
Acting Commissioner.

[PUBLIC—No. 6.]

AN ACT to amend Sections 2324 and 2325 of the Revised Statutes of the United States concerning mineral lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Section 2325 of the Revised Statutes of the United States be amended by adding thereto the following words: "*Provided*, that where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent, and the affidavits required to be made in this section by the claimant for such patent, may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, that this section shall apply to all applications now pending for patents to mineral lands."

SEC. 2. That Section 2324 of the Revised Statutes of the United States be amended by adding the following words: "*Provided*, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim; and this section shall apply to all claims located since the 10th day of May, A. D. 1872."

Approved January 22, 1880.

[CIRCULAR.]

GENERAL LAND OFFICE,
WASHINGTON, D. C., March 5, 1880.

To Surveyor-Generals, Registers, and Receivers:

GENTLEMEN—The circular of this office dated January 19, 1880, relative to surveys under the provisions of Section 2401, Revised Statutes of the United States, and circular dated June 27, 1879, "in relation to certificates of deposit on account of surveys," are hereby revoked, and the following is substituted therefor:

1. The provisions of law governing such surveys, and the issue

and application of certificates of deposit on account thereof, are Sections 2401, 2402, and Section 2403, United States Revised Statutes, as amended by Act of March 3, 1879, namely:

"SEC. 2401. When the settlers in any township, not mineral or reserved by government, desire a survey made of the same under the authority of the surveyor-generals, and file an application therefor in writing, and deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey, together with all expenses incident thereto, without cost or claim for indemnity on the United States, it may be lawful for the Surveyor-General, under such instructions as may be given him by the Commissioner of the General Land Office, and in accordance with law, to survey such township, and make return thereof to the general and proper local land office; provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and subdivisional surveys.

"SEC. 2402. The deposit of money in a proper United States depository, under the provisions of the preceding section, shall be deemed an appropriation of the sums so deposited for the objects contemplated by that section, and the Secretary of the Treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriations for the surveying service; but any excesses over and above the actual cost of the surveys, comprising all expenses incident thereto for which they were severally deposited, shall be repaid to the depositors respectively.

"SEC. 2403 (as amended by Act of March 3, 1879). Where settlers make deposits in accordance with the provisions of Section 2401, the amount so deposited shall go in part payment for their lands situated in the townships, the surveying of which is paid for out of such deposits; or the certificates issued for such deposits may be assigned by endorsement, and be received in payment for any public lands of the United States entered by settlers under the pre-emption and homestead laws of the United States, and not otherwise."

APPLICATIONS FOR SURVEYS.

2. Applications for surveys under Section 2401 must be made in writing, and must designate as nearly as practicable the township to be surveyed, and state that the applicants are actual, *bona fide* settlers therein; that they are well acquainted with the character and condition of the land included in said township, and that the same is not mineral or reserved by government.

3. The mineral character of a township will be determined from the character of the greater portion of the land. Where it is not known that the greater portion of the land of a township is mineral, such township will be deemed surveyable under the

provisions of Section 2401. In such case the application will state the fact that the greater portion of the land is not mineral.

4. Every application for a survey must be accompanied by affidavits corroborating in full the statements made in the application.

5. Copies of the application and affidavits, certified by the Surveyor-General of the district within which such lands are situated, must be transmitted to this office with the contract and bond entered into for the survey thereof.

6. Where the partial survey of a township becomes necessary on account of natural obstructions to a complete subdivision of the same, or of previous partial surveys, or for other good and sufficient reason, and it is impracticable to proceed regularly from a connection with the established southeast corner of the township, the survey must be connected with the nearest and most accessible established corner of existing surveys; and the lines must be properly run, measured, and marked from that point, so as to represent accurately and correctly the sections and subdivisions embraced in the surveys under execution. In such case the connecting corner should be fully identified and described in the manner required by law and instructions, and a full explanation should be given in the field notes of the deputy, showing the reasons for its adoption as the corner from which additional surveys are initiated.

7. Where one or more settlers on public lands make application as aforesaid for the survey of a particular township at his or their expense, the Surveyor-General shall furnish the applicant or applicants two separate estimates—one being for the cost of the subdivisional survey of the surveyable portion of the entire township, and the other to cover all the expenses incident thereto. The Surveyor-General will take the precaution to estimate adequate sums, in order to prevent deficiencies in the cost of the service.

DEPOSITS.

8. Settlers availing themselves of the foregoing provisions will deposit with an assistant treasurer, or in a designated depository of the United States, to the credit of the Treasurer of the United States on account of surveying the public lands and expenses incident thereto, in the district in which their claims are situated, the sums so estimated as the total cost of the survey, including field and office work.

9. Where several settlers desire the survey of the same township, the necessary deposit to cover all expenses of the survey and platting may be so subdivided as to be proportionate to the amount of lands within the township claimed by each settler.

10. In cases where the estimated cost of survey and incidental expenses is in excess of $200, the settler should be instructed to deposit in two or more sums, in order that no certificate may bear a face value of more than $200.

11. Settlers making deposits for surveys are required to transmit the *original* certificate of deposit to the Secretary of the Treasury, and the *duplicate* to the Surveyor-General. They will retain the *triplicate* to be used in the purchase of public lands in the surveyed township, if desired, or to be disposed of by assignment as provided by law.

12. The *triplicates* only, therefore, are to be received in the purchase of lands under the pre-emption and homestead laws; and should any originals or duplicates be presented in payment, the Register and Receiver are directed to take possession of the same, and to transmit them at once to the General Land Office for examination.

13. Where the amount of a certificate or certificates is less than the value of the lands taken, the balance must be paid in cash.

14. Where the certificate is for an amount greater than the cost of the land, but is surrendered in full in payment for such land, the Receiver will endorse on the triplicate certificate the amount for which it is received, and will charge the United States with that amount only.

EXCESS REPAYMENTS.

15. Where the amount of the deposit is greater than the cost of the survey, including field and office work, the excess is repayable upon an account to be stated by the Surveyor-General.

16. The Surveyor-General will in all cases be careful to express upon the Register's township plat the amount deposited by each individual, the cost of the survey in the field and office work, and the amount to be refunded in each case.

17. Before transmitting accounts for refunding the excess of deposits over and above the cost of surveys in the field and office work, the Surveyor-General will endorse on the back of the triplicate certificate of deposit in the possession of the depositor the following: "$———refunded to ————, by account transmitted to the General Land Office with letter dated ————," and will state in the account that he has made such endorsement. Where the whole amount deposited is to be refunded, the Surveyor-General will require the depositor to surrender the triplicate certificate of deposit, and will transmit it to this office with the account.

18. No provision of law exists for refunding to other than the depositor, nor otherwise than as referred to in the preceding sections.

ASSIGNMENTS.

19. Under Section 2403, as amended, certificates of deposit for surveys "may be assigned by *endorsement.*" Assignments of such certificates are therefore not required to be acknowledged before an officer authorized to take acknowledgments, but the

same will be recognized when made and presented in accordance with usages governing in cases of ordinary negotiable paper.

20. Certificates issued before or subsequent to March 3, 1879, may be assigned; but if issued prior to August 1, 1879, they must be sent to the General Land Office for an examination as to excess repayments, if any, before they can be received by the Receiver.

21. Assignments may be made to one or more persons; and when there are several original parties to, or several assignees of, one certificate, whether the same was issued on account of joint deposits or otherwise, and such certificate is presented in payment for lands to which it is authorized to be applied, the Register and Receiver will make the proper endorsement on the triplicate certificate presented, showing the satisfaction of the *pro rata* share of each party interested. They will make the same notes respectively on the Register's certificate of purchase and the Receiver's original and duplicate receipts.

22. When the entire amount of a certificate is not satisfied at the same time, the triplicate should be retained by the Receiver; and when fully satisfied, be sent up with his quarterly returns in the usual manner. But such certificates should, as far as practicable, be satisfied during the current quarter; and in order to avoid embarrassment in the settlement of Receivers' accounts, and to enable depositors to more readily utilize their certificates, attention should be particularly directed to the instructions contained in Section 10 of this circular.

23. The statute specifically provides that certificates, when assigned, may "be received in payment for any public lands of the United States entered by *settlers* under the *pre-emption* and *homestead* laws of the United States, *and not otherwise.*" They are therefore *not* receivable in payment for lands sold at public or private sale; nor for mineral, desert, coal, or timber lands; nor for fees and commissions on homestead entries; nor in any manner otherwise than as provided by law.

REGISTER'S AND RECEIVER'S RETURNS.

24. In their monthly cash abstracts the Register and Receiver will designate the entries in which certificates of deposit are used, and the balances paid in cash, if any, noting on the certificates of purchase and receipts the manner of payment. The Receiver, in his monthly account current, will debit the United States with the amount of such certificates, and in his quarterly accounts will specify each entry made with these certificates, giving number, date, amount for which received, by whom and with whom the deposit was made, and debit the United States with the same, which must accompany his accounts as vouchers.

Very respectfully,

J. M. ARMSTRONG,

Acting Commissioner.

[CIRCULAR.]

RELINQUISHMENTS AND CONTESTS UNDER ACT OF MAY 14, 1880.

GENERAL LAND OFFICE,
WASHINGTON, D. C., May 25, 1880.

To District Land Officers:

GENTLEMEN—Appended hereto is a copy of the Act approved May 14, 1880, which changes existing laws and regulations relative to the entry of certain classes of lands.

The first section provides: "That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office."

This will be held to apply only to relinquishments which are filed subsequent to date of said Act—viz., May 14, 1880.

You are instructed not to accept or act upon any relinquishment, unless made before you, which has not been duly subscribed by the claimant, on the back of his duplicate receipt, and acknowledged, witnessed, and executed in a manner which, under the laws of the State or Territory in which the land is situated, would be sufficient as a valid transfer of real estate. In case of the loss of a duplicate receipt or declaratory statement receipt, an affidavit of such loss must accompany the written relinquishment.

Immediately upon a relinquishment duly executed as above being received at your office, you will proceed as follows:

1. The Register will note on the relinquishment, over his signature, the day and hour of its receipt by you.

2. Write the words, "Canceled by relinquishment" (giving date) opposite the record of the entry in the tract-book, the register of entries, and the register of receipts.

3. Draw a line over the number of the entry on the township plat.

4. On Monday of each week you are directed to transmit to this office all the relinquishments which have been accepted by you during the preceding week.

When the relinquishment shall have been received and noted as above, you will hold the land embraced in the relinquished entry as subject to settlement or entry by the first legal claimant—the intent of said section, as understood by me, being only to prevent the delay resulting heretofore from awaiting action on such relinquishments by this office.

Section 2 is designed to secure to the contestant therein named, for the period of thirty days from notice of the cancellation of a prior entry of the character specified, a preference right to

initiate his claim to the same land. It is not intended to grant such contestant the unconditional right of final entry; and I construe the section as precluding settlement or entry by any other party during the period named.

Section 3 places homestead settlers on unsurveyed public lands on the same footing with pre-emption settlers under existing laws. This section protects the claim of an actual settler upon unsurveyed land, provided he shall make homestead entry of the land within three months from the filing of the township plat of survey in the district land office, the same as the pre-emptor is now protected by filing his declaratory statement within the same period; and if the homestead settler shall fully comply with the law as to continuous residence and cultivation, his settlement defeats all claims intervening between its date and the date of filing his homestead application. In making final proof, his five years of residence and cultivation will commence from date of actual settlement.

C. W. HOLCOMB,
Acting Commissioner.

[PUBLIC—No. 58.]

AN ACT for the relief of settlers on public lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

SEC. 2. In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the Register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, that said Register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported.

SEC. 3. That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record; and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

Approved May 14, 1880.

Legal Facetiæ.

LAWYER C——(entering the office of his friend Dr. M——, and speaking in a hoarse whisper): "Fred, I've got such a cold this morning that I can't speak the truth." Dr. M: "Well I'm glad that it's nothing that will interfere with your business."

ONE very hot day a case was being tried in a court of law in one of the Western States. The counsel for the plaintiff had been speaking at great length, and, after referring to numerous authorities, was about to produce another imposing volume, when the Judge inquired what was the amount in dispute. On being informed that it was $2, "Well," said he, "the weather is very hot; I am very old, and also feeble—I'll pay the amount myself.',

A MAN went into a store the other day, and asked to look at a revolver, and the weapon was shown him. Then he asked to see a cartridge, and one was handed him. Then he placed the muzzle to his head and scattered his brains over the store. "Well," ejaculated the astonished storekeeper, glancing at the solid walls, "a man who will do such a thing deserves to be sent to jail for five years!"

WHILE Mr. Fulweiler was cross-examining a witness named Jones, in a case at Auburn, Placer County, the latter became irritated at what he regarded as uncalled-for and unreasonable questions that were being asked of him, and drew a pistol on the attorney in open court. He was disarmed before he could use the weapon, and it is believed that Fulweiler will overlook the circumstance. This reminds the *Nevada City Transcript* of an incident that occurred in that city some twenty-five years ago, more or less, and one that has not been easily forgotten by the principals. An attorney, who is now very prominent in the county, was cross-questioning a witness of acknowledged probity for the opposite side, and, according to the usual custom, went out of his way to harrass and anger the victim. The latter remained apparently unruffled—although the disciple of Blackstone several times intimated that he was no better than a perjured horse-thief—and told a straight, unvarnished tale. The trial had become a thing of the past, and a week elapsed when the two men, who had formerly been friends, met. The lawyer's cordial salutation was responded to with a snub. The outraged witness has since become one of the most popular and wealthy citizens of the county. Although the brow-beating attorney has many times, subsequently to giving the needless insults, endeavored to renew the acquaintanceship with him in hopes of securing his patronage, he still treats him with contempt when they meet. He says he will carry the remembrance of the insults to the grave with him, and will never forgive them.

Pacific Coast Law Journal.

VOL. V. JULY 17, 1880. No. 21.

[The LAW JOURNAL has telephonic connection with all portions of the city. Our patrons are cordially invited to call at the office, No. 511 Montgomery Street, and send any information or directions desired. We have connection with the New City Hall, and will have any message intrusted to us delivered to any part of the Hall. Please communicate to us any orders concerning your briefs and transcripts, or any matters relating to the JOURNAL. The telephone used by us is the "Bell."]

Current Topics.

IN *Toledo etc. R. R. Co.* vs. *Wright* (Supreme Court of Indiana, November term, 1879), it is held that Section 28 of the Indiana Statute which provides that, "if any passenger shall refuse to pay his fare or toll, the conductor of the train and the servants of the corporation may put him off the cars at any usual stopping place," is permissive and not prohibitory in its terms, and under it a railroad company may eject such passenger between stations. A passenger who refuses to pay the regular fare is from that moment an intruder, and wrongfully on the train, and has no lawful right to be carried gratis to the next station, but may be expelled at once.

WE are indebted to the *Solicitors' Journal* for a note of a very important ruling in criminal practice, which took place at the Leeds Assizes, England, upon the question whether a prisoner could both speak himself and have his counsel also to speak for him. Mr. Justice HAWKINS, after conferring with Mr. Justice LUSH, held as follows: "I think that, though there are *dicta* of individual Judges to be found in the books that a prisoner, when defended by counsel, is not at liberty to make a statement to the jury, I ought not to be bound by any such *dicta*, because there is no decision of any Court of criminal appeal on the point. As a general principle, a prisoner may make his statement, and give his ver-

sion of the transaction in respect of which he stands charged. I shall, therefore, though counsel appears for the defense, admit the statement of the prisoners." In this case, after the end of their counsel's address, the prisoners made their statement to the jury. The *Solicitors' Journal* suggests that the better course would have been to allow the statement to be made first, so as to enable the prisoners' counsel to comment on it. (24 Sol. J. 266.)

THE difficulty experienced in impaneling a jury in a recent murder trial in New York has brought out still another mode of procuring jurors in such cases. It is proposed that forty-eight men shall be drawn, examined, and sworn in as jurors, just as the twelve now are. These forty-eight men shall be kept together during the trial, and be guarded in the same way as a jury now is. They shall all sit and hear the evidence. When the case closes, twelve of the jurors shall be drawn; and if they agree upon a verdict, that ends the case: if they cannot agree, they are discharged, and twelve more are drawn from the original forty-eight. If the second twelve cannot agree, a third twelve are drawn, and so on until the whole forty-eight have been called upon to render a verdict.—*Central Law Journal.*

THE Supreme Court of Louisiana is reported to have rendered a curious decision lately. In the case of one Frankenstein, who was sentenced to twenty days' imprisonment and $100 fine for selling lottery tickets other than those of the Louisiana State Lottery, application was made to one of the District Judges for a writ of *habeas corpus*. The State applied to the Supreme Court for an injunction restraining the District Judge from issuing the writ, and an injunction was granted. Such a decision is a virtual suspension of the writ of *habeas corpus* in that State, and cannot but be regarded as a most dangerous application of the remedy by injunction. From the unusual character of the decision, as reported, some doubt may be expressed as to whether the case in all its points has been correctly stated in the meagre report given.—*Chicago Legal News.*

Supreme Court of California.

DEPARTMENT NO. 1.

[Filed July 1, 1880.]

[No. 6943.]

CURTIS, RESPONDENT, vs. PARKS, APPELLANT.

ACTION BY A SURETY AGAINST A SURETY. No one can be a debtor for money paid unless it was paid at his request; so where an action is brought against a surety on an official bond, by another surety, for the amount of his *pro rata* of the official's delinquency—the action being neither upon the bond nor for contribution—the action cannot be sustained unless it be averred that the defendant agreed to pay the *plaintiff* such *pro rata*, or that it was agreed between the plaintiff and defendant that the plaintiff should pay *defendant's pro rata*, in consideration of which the defendant should refund to the plaintiff.

Appeal from the District Court of the Eighteenth Judicial District, San Bernardino County.

C. W. C. Rowell, for respondent.
Tulbott & Harris, for appellant.

Ross, J., delivered the opinion of the Court:

The plaintiffs (six in number), the defendant, and various other persons (seventeen in all), became sureties in several sums upon the official bond of one Rogers, as Public Administrator of the County of San Bernardino. The complaint charges that afterwards letters of administration in the matter of the estate of one Averline, deceased, were duly issued to Rogers as such Public Administrator, and that on the same day the latter entered upon the administration of said estate. That subsequently Rogers was removed, and one Fulwiler duly appointed administrator of the estate, and an order made directing Rogers to deliver to Fulwiler all moneys and other property in his hands belonging to the estate, among which was the sum of twenty-eight hundred dollars. That Rogers failed to pay over said sum, and that the sureties became liable therefor. For the plaintiff's cause of action the complaint then proceeds as follows: "That on the——day of September, A. D. 1877, plaintiffs and Peter Filance, William Hawley, M. Katz, J. A. Rosseau (the last four named of whom are not parties to this action, but were sureties upon the bond), and defendant, agreed and promised that they would pay the said W. B. Fulwiler, administrator as aforesaid, the sum of twenty-eight hundred dollars, promising and agreeing, each with each and all the others, that they would so pay in pro-

portionate rate as the total original liability of said last named persons—to-wit, plaintiffs and Peter Filance, Wm. Hawley, M. Katz, J. A. Rosseau, and defendant—upon said official bond of said Albert Rogers—to-wit, thirteen thousand dollars—bore to the said sum of twenty-eight hundred dollars, so should the original liability of each upon said original bond bear to the sum each should pay. That defendant's original liability upon said bond was the sum of $2,000, and the amount of his proportionate rate of the $2,800 the sum of $430.74 gold coin. That on or upon the 1st day of December, A. D. 1877, plaintiffs paid and fully discharged the said sum of $2,800; and that afterwards—to-wit, on or about the 25th day of December, A. D. 1877, and before the bringing of this suit—plaintiffs demanded of defendant his proportion of said sum so by them paid—to-wit, $430.74—and that defendant has wholly refused and neglected to pay said sum, or any part thereof." Wherefore the plaintiffs brought the present action to recover, and did recover, judgment against defendant for the last mentioned sum.

After carefully considering the complaint, we cannot discover that it states any cause of action in favor of the plaintiffs against the defendant. There is no averment that the defendant ever agreed to pay the *plaintiffs* anything, or that it was understood or agreed between the plaintiffs and defendant, or any of the parties mentioned, that the plaintiffs should pay to Fulwiler the *defendant's pro rata* share of the deficit, in consideration of which the defendants should refund to plaintiffs. This is not an action upon the bond, nor one for contribution; but the action is based upon the alleged contract of September, 1877, which, according to the allegations of the complaint, did not provide for the payment by the *plaintiffs* of the defendant's *pro rata* share of the money due from the late administrator. The complaint failing to show any agreement or understanding by which the plaintiffs were authorized to pay the defendant's part, or any promise by the latter to repay, it fails to show any right in plaintiffs to recover what must be regarded, as the case is presented by the complaint, as a voluntary payment. No man can be a debtor for money paid unless it was paid at his request. (Hilliard on Contracts, vol. 1, p. 71; 1 Parsons on Contracts, sixth edition, p. 471, and note "F," p. 273.)

It follows that the judgment and order must be reversed, and the cause remanded, with directions to sustain the demurrer to the complaint.

So ordered.

We concur: McKinstry, J., Morrison, C. J.

DEPARTMENT NO. 2.

[Filed June 22, 1880.]

[No. 6002.]

MAHONEY, RESPONDENT, vs. BRAVERMAN, APPELLANT.

STREET ASSESSMENTS—POWERS OF SUPERVISORS. The Board of Supervisors has power to order the doing of street work on two distinct and separate streets in one and the same contract.

VOID ASSESSMENTS. Where street work is not completed until after the date fixed by the contract, the assessment is void.

Appeal from the District Court of the Third Judicial District, San Francisco County.

C. H. Parker, for respondent.
Gunnison & Booth, for appellant.

THORNTON, J., delivered the opinion of the Court:

This is an action to enforce an assessment for a street improvement. The improvement referred to is the construction of cement pipe-sewer, with flushing hole and cover, in Willow Avenue from Octavia to the centre line of Gough Street, and in Gough Street from a point opposite the centre line of Willow Avenue to Eddy Street, to connect with the sewer in the crossing of Gough and Eddy streets. The Court gave judgment for plaintiff. The defendant moved for a new trial, which was denied; and this appeal is prosecuted from the judgment and order of the Court denying the new trial.

It is urged on behalf of the appellant that the Board of Supervisors had no authority to order the doing of the above mentioned street work, for the reason that it included two distinct and separate streets in one and the same contract and assessment; that the order for such work is illegal and void, having been made without authority of law.

The diagram which was in evidence shows this condition of the streets: Willow Avenue runs perpendicularly to Gough Street, the course of the avenue being east and west, while that of Gough Street is north and south. Eddy Street is south of and parallel with Willow Avenue, the north line of the former being distant from the south line of the latter one hundred and twenty feet. Octavia Street is west of and parallel with Gough, and distant from it four hundred and twelve and a half feet. The work was to be done partly in Willow Avenue and partly in Gough Street, which last, as we have seen, ran at right angles to the former

—that is to say, the sewer referred to was to run from Octavia Street along Willow Avenue easterly to the centre line of Gough Street, then turning south at right angles to run in a southerly direction along Gough Street so as to connect with the sewer in the crossing of Gough and Eddy streets.

It is objected that the Board of Supervisors had no jurisdiction or power to order a sewer to be constructed in Willow Avenue and in Gough Street in one and the same award and contract, inasmuch as they were two separate streets. To sustain this objection, we are referred to the Act of the Legislature of April 1, 1872. (See Acts of 1871–2, p. 804.) By the third section of this Act, the Board of Supervisors are authorized and empowered "to order *the whole or any portion*" of the streets, lanes, alleys, places, or courts described in the first and second sections of the Act, graded or regraded to the official grade, planked or replanked, paved or repaved, macadamized or remacadamized, piled or repiled, capped or recapped; and to order sidewalks, *sewers*, cesspools, manholes, culverts, curbing and crosswalks to be constructed, and to order any other work to be done which shall be necessary to make and complete the *whole* or any portion of said streets, lanes, alleys, places, or courts; and they may order any of the said work to be improved."

No question is made but that the streets above named, Willow Avenue and Gough Street, in which the sewer was to be constructed, came within those described in the first and second sections of the Act referred to. On the most cursory perusal of the section cited, one must be struck with the broad and ample powers conferred by them on the Board of Supervisors in regard to street improvements. These powers seem to embrace every conceivable variety of street improvement, and they certainly embrace the whole or any portion of the streets to be improved. The language used is not of such a character as to confine the powers vested in the Board to each street. If such had been the intention of the Legislature, language suitable to disclose that intention and warrant the interpretation that each several street was referred to, and that the powers granted were to be so confined, could have been readily found, and would have been employed. Such an intention would have been clearly manifested by inserting the words "of each" before the words "of the said streets," etc. To sustain the construction of the words referred to would be to violate the well-settled rule for the construction of statutes that the words are to be taken in their ordinary and popular sense unless technical words are used. When words of the latter character are

used, the technical meaning must be adopted. No such words as these last mentioned are before us for construction, in considering the point under examination.

The power as to sewers is as broad as the power in relation to streets. The language employed in regard to them indicates that they were considered necessary by the lawmakers as necessary to make and complete the streets referred to, and the Board is invested with power to order them constructed with reference to the completion of the *whole or any portion* of said streets, etc. The street cannot formally be accepted, nor can any portion of a street, until a brick sewer or cement pipe has been constructed therein (Section 20 of Act of 1872), which distinctly shows that, in the view of the law-making power, the street was not completed until the sewer or its substitute had been made. An exception to this is where such improvement as a sewer is deemed by the Board to be unnecessary. It would be strange legislation to provide that the *whole or any portion* of the street referred to in sections one and two might be improved under one order or resolution or award, as designated by grading and regrading, paving and repaving, macadamizing and remacadamizing, and that an order or proceeding for such an improvement as a sewer must be confined to one street. To restrict in this manner the power of the Board might have entailed such an expense in the construction of a sewer as to retard the improvement of property, or have impaired the health of the city. The topography of the region might indicate a street running at right angles, or at any other angle, to another as the proper medium of exit for the sewage matters to be carried off; whereas the extension of such an improvement in the continuous line of the street might be rendered unwise or injudicious by the interposition of a high cliff or other obstacle, entailing difficulty and expense which might render the work impracticable by reason of the heavy charge which would fall on the property holders. Under such circumstances the improvement could not be made, it may be, to the great detriment of persons living near. In this view the power was wisely vested in the Board to make the sewer in the mode adopted in the case before us.

That the Legislature had the constitutional power to invest the Board of Supervisors with this authority we regard as settled by the case of *Emery* vs. *The San Francisco Gas Company*, 28 Cal. 345, and the numerous cases approving and following it. Particularly, *Emery* vs. *Bradford*, 29 Cal. 82; Appeal of Piper, 32 Cal. 557; *Walsh* vs. *Matthews*, 29 Cal.

123; *Taylor* vs. *Palmer*, 31 Cal. 240; *Chambers* vs. *Satterlee*, 40 Cal. 514; *Meuser* vs. *Risdon*, 36 Cal. 244.

Nor is this interpretation out of harmony with the other provisions of the Act, as is contended on behalf of appellant. It is urged for him that the Board of Supervisors, in joining Willow Avenue and Gough Street in advertising for bids, and in awarding the contract for both streets jointy, prevented the owners of property on Willow Avenue and the appellant from taking the contract and doing the work on the avenue, and that this was a fraud on defendant. To sustain this position we are referred to Section 6 of the Act of 1872 above cited.

It is provided by this section that, after the award for doing the work shall be made to the successful bidder, notice of it shall be published for a certain number of days; "and within five days after the first publication of said award the owners of a majority of the frontage lots and lands liable to be assessed for said *work* * * * may elect to do the said work," and enter into the contract warded, etc.

We see no violation of the rights of appellant in this cause. The majority of the owners of the frontage on both streets, Gough Street and Willow Avenue, were not prevented from electing to do the work and take the contract. The whole frontage on both streets is referred to (for that is the frontage of the *work*), and not the frontage on Willow Avenue alone, as is the contention of appellant.

It must be presumed that, the publication of the award as required by the law was made, nothing appearing to the contrary in the record before us; and the majority of owners above referred to were at liberty to elect to do the work under the contract awarded. For the reasons above given we find no error in the order overruling defendant's demurrer to the complaint.

The further point is made that there is no evidence that the Board of Supervisors heard or took testimony on the appeal from said assessment. Conceding that the *People* vs. *O'Neil*, 51 Cal. 91, is correctly decided (and we see no reason to doubt it), it does not appear from the statement which it represents "contains all the testimony, proof, and evidence," that any testimony was offered by the parties appealing, or that they asked that any witnesses be sworn and examined. From the statement this appears: "Mr. Gunnison, called for the plaintiff, testified that he had witnesses, but did not recollect whether they were examined before the Board; thought that they were not sworn, and that a legal question was raised and referred to the City and County

Attorney on motion of Mr. Lynch, and he returned to the Board his opinion thereon." On this opinion it seems the appeal was dismissed.

The above is consistent with the fact that the only matter urged on the appeal was a question of law, on which the Board passed and dismissed the appeal. It is also consistent with the fact that the witnesses were never present at any time during the action on the appeal, or, if they were, that the appealing parties did not ask then, or at any time, that they should be sworn and examined. In the case referred to in 51 Cal., the Board, without giving any notice to the parties of the time and place of hearing the appeal, made an order dismissing it; and on this ground the Court held that the appeal must be regarded as still pending, and therefore the action was prematurely instituted. As regards this point, there was no error committed by the Court below.

But it does appear from the testimony that the contract was not completed within the time specified in it. The contract bears date the 12th day of November, 1874, and by its terms the work was to be commenced within five days and completed within twenty days from the date of the contract. The plaintiff had until and including the second day of December, 1874, to finish the work. The evidence shows it was not finished until after that date—viz., on the 13th of January, 1875. This is fatal to the assessment. (See *Beveridge* vs. *Livingston*, opinion filed 27th of December, 1879; *Turney* vs. *Dougherty*, opinion filed October 6, 1879.) In these cases the time had been extended, but not until the time fixed by the contract for completing the work had expired. In the case before us *there was no extension at all.* The first case cited above was under the Act of 1872, referred to in this opinion; the latter under the Act of 1862. In the latter case the Court said: "Before the extension of the time it is obvious that the contractor could claim nothing under the contract, and it would be as impossible for him to attempt to do so as it would if he had abandoned the contract or rescinded it, as far as he had power so to do." This language *a fortiori* applies to the Act of 1872. (See *Beveridge* vs. *Livingston*, above cited.) This defect could not be cured by an appeal to the Board of Supervisors, and therefore it could not be reached by appeal. (*Dougherty* vs. *Hitchcock*, 35 Cal. 523.)

Conceding for the purposes of this case that the Superintendent of Streets, under the direction of the Board of Supervisors, might have extended the time after the time fixed in the contract had expired and before the work was

done, there was no power at any time to do so after the work was completed before such extension.

An issue is directly raised in the answer on this point, and we discern no finding on it, unless it be "that the plaintiff had done and performed said work as specified in said contract." Construing this to be a finding on the issue referred to, it is not sustained by the evidence. If this be not a finding, then the judgment should be reversed and cause remanded for want of a finding on this point. (*Billings* vs. *Everett*, 52 Cal. 661; *Shaw* vs. *Wandersford*, 53 Cal. 300.) In our opinion the Court erred in denying the motion for a new trial.

The judgment and order are therefore reversed, and cause remanded for a new trial.

We concur: Sharpstein, J., Myrick, J.

DEPARTMENT No. 1.

[Filed July 8, 1880.]

[No. 7009.]

MYERS ET ALS., APPELLANTS,

vs.

SPOONER ET ALS., RESPONDENTS.

CONFLICT OF EVIDENCE. Where there is a substantial conflict in the evidence, the verdict will not be disturbed.

MINING CLAIM—ABANDONMENT. Abandonment is a question of intention, and of this intention the jury are the judge in view of all the facts and circumstances; and their verdict will not be disturbed, though contrary to the statement of the locator.

LOCATION OF CLAIM—MISTAKE OF RECORDER. If all the steps required by the rules and regulations of the district have been taken, such is sufficient to impart notice to all; and the locator's rights will not be affected by a mistake of the Recorder in omitting one of the lines.

Appeal from the District Court of the Fourteenth Judicial District, Nevada County.

Johnson & Cross and *Drake & Rix*, for appellants.

Miles Searles and *A. B. Dibble*, for respondents.

ROSS, J., delivered the opinion of the Court:

Ejectment to recover a mining claim. The answer denied the plaintiff's alleged title, averred title in defendants, and interposed the plea of the Statute of Limitations. The case was tried in the Court below with a jury, a verdict rendered for the defendants, upon which judgment was duly entered;

and from the judgment, as well as from the order refusing them a new trial, the plaintiffs prosecute this appeal.

We have looked carefully through the record, and cannot say that the evidence does not support the verdict. It appears that on the 26th of November, 1856, E. A. Leathe (one of the plaintiffs) and one Holton located the ground in controversy by recording the same in the mining records of the district as the Holton & Co. claims, and by posting a notice thereon, and, as some of the witnesses for the plaintiffs testified, by setting stakes at the corners and digging a small ditch around the claims. The mining rules and regulations of the district required, among other things, that in locating a claim stakes should be put up at each of its corners, and also that it should be bounded by a small ditch. At the trial there was evidence given, on behalf of the defendants, tending to show that these requirements were not complied with on the part of the locators, under whom the plaintiffs claim. There was, therefore, a conflict in the testimony on this point. Holton, soon after the location mentioned, transferred his interest in the claims to Leathe and left the State. None of the other locators were, so far as appears, residents of the vicinity, or knew anything of the location. Leathe left the neighborhood in a few weeks, and for fifteen years next after the location no work whatever was done thereon, and, so far as appears, no assertion of ownership made to the ground by plaintiffs, or for them on their behalf. The ground, however, is what is known among miners as "back hill" ground, and could not and cannot be worked to advantage until the earth in front is carried off. The rules and regulations of the district required all claims to be worked every ten days; but it seems that this rule was generally disregarded, although some of the witnesses for the defendants, who held claims in the district, testified that they had regarded it as all the time in force. The rules and regulations, however, did not provide for any forfeiture or penalty in the event the work was not performed. In April, 1858, the *locus in quo* being apparently vacant land, R. N. Palmer and others, under the name of the "Joint Stock Co.," located twenty claims, recorded them, posted a notice thereon, set stakes at the corners, and dug a ditch around the ground, and soon after sunk a shaft 75 feet deep thereon. This location covered a portion only of the Holton location. In October, 1859, Sweetland, Bicknell, and others, believing the Joint Stock Company to have more ground within their lines than they were entitled to hold under the local rules and regulations, located twenty-six claims, covering a portion of the

Joint Stock and the residue of the Holton location. They dug a ditch around the ground located, staked it off, and posted a notice thereon describing the ground, and filed a copy thereof for record. In recording this notice, the District Recorder omitted by mistake one of the lines. In 1869 the Joint Stock Company, the Sweetland and Bicknell Company, and still another company claiming ground to the west of them, consolidated their claims under the name of the Joint Stock Company, re-ditched the whole, and placed large painted stakes at the corners and angles thereof containing the name of the company. The deed of consolidation was executed in 1871. The companies named also sunk a shaft 118 feet deep, drifted and mined the claim, always keeping the exterior ditches well defined and the stakes in place until 1872, when they sold to the present defendants, who have since worked the claims. In November, 1871, R. B. Patton, one of the plaintiffs, obtained a deed from Leathe for one share in the Holton claim, and entered upon it, re-set the stakes, and dug a ditch all around it, except on the boundary line between it and the Watson and Stevens claim; and he performed work on the ground during that year and the succeeding years of 1872–3–4 and 5.

We think the evidence sustains the verdict: First, because if it was true, as some of the testimony given on the part of the defendants tended to show, and of which the jury were the judges, that in locating the Holton & Co. claims the important conditions of the local rules and regulations, requiring the boundaries to be marked with a ditch, and stakes to be placed at the corners, were not complied with, then it would follow that no valid location was made; and the jury having found for the defendants upon this as well as upon all other questions of fact, we cannot disturb the verdict—there being a substantial conflict in the evidence. Secondly, we cannot say, upon the facts as they are made to appear in the record, that the jury was not justified in finding an abandonment of the Holton & Co. claims prior to the location of the same ground by the parties under whom the defendants claim. Abandonment is a question of intention, and of this intention the jury were to judge, and did judge, in view of all the facts and circumstances of the case. It is true, as stated in the brief of counsel for appellants, that Leathe testified at the trial that there was no intention by him or his co-locators to abandon the claims. But his testimony to that effect was not conclusive upon the jury. If that was so, it would follow that all any party would have to do, in order to defeat the defense of abandonment, would be to *say* he did

not intend to abandon. The intention, however, is to be derived, as already observed, from all the facts and circumstances of the case. Considering those facts and circumstances, the jury found for the defendants, and we cannot disturb the verdict on that ground. (*Moon* vs. *Rollis*, 36 Cal. 333; *Keene* vs. *Cannavan*, 21 Cal. 303–4; *Harvey* vs. *Ryan*, 42 Cal. 626; *Morenhaut* vs. *Wilson*, 52 Cal. 263.)

It is urged in behalf of the appellants that the Court below erred in permitting "evidence of the admissions and statements of plaintiff Patton (as well as of his acts), spoken and done, before he was a tenant in common with his co-plaintiffs, to go to the jury against defendants' objections." This objection of counsel assumes what the record does not show to be the fact. On cross-examination, the witness was questioned by the defendants' counsel as to his knowledge concerning the Joint Stock, the Sweetland, Bicknell, and the Joint Stock Company Consolidated locations, and in response to the question, to which there was no objection, the witness said: "I just knew of their locations by the record, and I once saw a stake which had fallen down, way down at the lower end, near the reservoir, just on the bank of the reservoir." The defendants then proposed to question the witness Patton concerning conversations had between him and some of the defendants prior to the conveyance to him, to which the plaintiffs objected, and which objection the Court overruled. The ruling, however, could not possibly have injured the plaintiffs, since the record fails to show that any such question ever was, in fact, asked or answered by the witness. The witness subsequently testified, "that on one occasion he carried the chain and assisted in making a survey of the 'Joint Stock Company's' ground, and that he had suggested the name of "'Joint Stock Company' for the claim." This was responsive to the questions of counsel for the defendants, already referred to, respecting the knowledge of the witness in the matter of the location by the Joint Stock Company, and was proper.

The only other point made for the appellants which we deem it necessary to notice is, that the defendants are concluded by the lines of the claim as shown in the records of the mining district. As already stated, the District Recorder, in recording the notice filed by Sweetland, Bicknell, and others, in 1859, omitted by mistake one of the lines. Several witnesses for the defendants testified that all of the ground in dispute was embraced within the locations under which the latter claim; and plaintiff Patton himself, after testifying that a portion of the premises was *omitted*, said:

"In saying the Joint Stock Company's lines leave out a portion of the ground in dispute, I mean to say the lines *as described in the mining record;* the stakes and ditches of the Joint Stock Company included all the ground in dispute. There may be a mistake in the record, by the Recorder's skipping and failing to record one of the lines in the Sweetland and Bicknell location. I don't know as to that; I only follow the record as it appears."

We do not think the defendants are bound by the mistake of the Recorder in copying the notice in the book of records. (*Kelley* vs. *Taylor*, 23 Cal. 11; Weeks on Mineral Lands, Sec. 104.)

There was testimony given at the trial tending to show that all the steps required by the local rules and regulations were performed by the locators making the locations under which the defendants claim; that the lines were distinctly marked upon the ground, a ditch dug and kept open, stakes stuck, and notices posted. This was sufficient to impart actual notice to all comers. No one could have been injured by the mistake of the Recorder; and we think the judgment and order should be affirmed. So ordered.

We concur: McKinstry, J., McKee, J.

DEPARTMENT NO. 2.

[Filed June 12, 1880.]

[No. 6697.]

THE PEOPLE EX REL. TRACY, RELATOR, vs. BRITE, RESPONDENT.

VACANCY—APPOINTMENT. If an office becomes vacant because the incumbent ceases to be a resident of the district for which he is chosen, or within which the duties of the office are to be performed, an adjudication previous to an appointment is unnecessary.

IDEM—RIGHTS OF INCUMBENT. The incumbent in an action to test his right to the office, may make any defense he may have against the appointment.

EVIDENCE. It is error to allow the petition circulated for the appointment of his successor, stating that the relator had in fact ceased to be a resident of the district, to go to the jury.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Jo Hamilton, V. A. Gregg, S. L. Cutter, and *Geo. E. Otis,* for appellant.

J. W. Freeman and *R. E. Arick,* for respondent.

MYRICK, J., delivered the opinion of the Court:

This is a proceeding to test the right of relator to the office of Supervisor of the Third District, Kern County. The relator was elected November 7, 1876, and duly qualified and entered upon the duties of the office November 20, 1876. Respondent claimed the office under appointment by the County Judge of September 24, 1877. The appointment by the County Judge was based upon the fact that Tracy had "ceased to be an inhabitant of the said district, and his office had thereby become vacant." No judicial proceedings had been had to declare a vacancy. The question then is, whether proceedings must first be had to declare a vacancy, or whether an appointment can be made if the fact of vacancy exist.

Section 996, Political Code: "An office becomes vacant on the happening of either of the following events before the expiration of the term: * * * 5. Upon the incumbent ceasing to be an inhabitant of the district (if the office be local) for which he was chosen, or within which the duties of the office are required to be discharged."

There are instances named in the section where proceedings must be had to ascertain the alleged fact, before an appointment of a successor can be made; but the case in hand is not one of them. When the relator ceased to be an inhabitant of the Third District, he ceased to be Supervisor of that district, and a vacancy occurred.

The issue of vacancy or not can be, and is to be, determined in this case. The relator has his day in Court in this action upon that issue, and we see no necessity of a previous adjudication. The Legislature was competent so to enact, and, as we have stated, has so enacted.

The relator objected to the irregularity of the proceedings in the appointment of the respondent; but, in our opinion, the objection is not tenable. However, upon the trial the respondent offered in evidence a paper purporting to be signed by various parties, requesting the County Judge to appoint the respondent to the office vacated, which paper recited that "said Tracy has ceased to be an inhabitant of said district," etc. This paper was admitted in evidence, notwithstanding the objection of the relator. This was error. The appointing power was with the County Judge, and the petition was entirely irrelevant for any purpose. The petition was not necessary to call the appointing power into action. The recital in the petition that Tracy had ceased to be an inhabitant of the district was not, on the trial, evidence of the fact; and we cannot say how far the jury were influenced in their

verdict by the recital. Substantially the same recital appears in the order of appointment, but that paper was admissible. If any part was inadmissible, the relator should have objected to that; or the Court would, on request, have instructed the jury that the recital in the order that the relator had ceased to be an inhabitant of the district was not evidence.

Judgment reversed, and cause remanded.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 1.

[Filed June 30, 1880.]

[No. 6715.]

HELLMAN ET AL., RESPONDENTS,

vs.

JONES ET AL., APPELLANTS.

PATENT—PRE-EMPTION. A patent must be held valid as against one who has not brought himself into relation with the State or United States; so where a pre-emption claim was rejected by the local officers, and no appeal taken therefrom, the claimant cannot set up rights against a State patent.

LIEU LANDS—PRE-EMPTION. Lieu lands settled upon by an actual settler under the homestead or pre-emption laws is not subject to confirmation to the State. But the claim of the settler must be presented to the Register and Receiver of the District Land Office within twelve months after the passage of the Act of Congress of March 1, 1877; otherwise the lands may be confirmed to the State.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

R. M. Widney, for respondents.

J. H. Blanchard, for appellants.

MCKINSTRY, J., delivered the opinion of the Court:

The action is ejectment, the plaintiff claiming title through a patent from the State of California. Defendant Jones is in possession of the land, and claims right thereto as a pre-emption settler. The jury found special facts and a general verdict for defendant Jones. The Court below set aside the general verdict, and gave judgment for plaintiffs upon special findings.

It is urged by appellant Jones that he is in privity with the title of the United States within the rule as laid down in *Rosencrans* vs. *Douglass*, 52 Cal. 213, and may therefore attack the patent in an action at law. But in that case the

application of the defendant for the land as a pre-emptioner was yet pending and undetermined. In the case before us the pre-emption claim of defendant was rejected by the local officers in 1872, and from this decision no appeal has been taken. The alleged right of defendant has been adjudicated by the agents of the United States adversely to him. He does not come within the class of persons described in *Robinson* vs. *Forrest*, 29 Cal. 320. He has no interest or claim which is recognized by the laws of the United States as a valid subsisting right. The patent must be held valid as against defendant, who has not brought himself into relation with the State or the United States. (10 Cal. 295; 21 *Id.* 423; 23 *Id.* 437; 25 *Id.* 251; 28 *Id.* 101; 29 *Id.* 312; 33 *Id.* 89; 27 *Id.* 520; 34 *Id.* 512; 38 *Id.* 33; 40 *Id.* 71; *Ibid.* 370.)

The land in lieu of which the land in dispute was applied for by the assignor of plaintiff, was, at the date of the application, within the exterior limits of a Mexican grant, the final survey of which has never been confirmed. (Finding No. 10.) The listing of the land in controversy to the State, therefore, did not transfer the title of the United States. The land in lieu of which the land was selected was not then lost to the State. (*Rosencrans* vs. *Douglass*, *supra*.) The first section of the Act of Congress of March 1, 1877, however, provides: "The title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of the 16th and 36th sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said State, is hereby confirmed to said State in lieu of the 16th and 36th sections, for which the selections were made."

The third section of the same Act provides: "The foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter not exceeding the prescribed legal quantity under the homestead or pre-emption laws; provided * * * that the claim of such settler shall be presented to the Register and Receiver of the District Land Office, together with proper proof of his settlement and residence, within twelve months after the passage of this Act," etc.

The only action of defendant after the refusal of his offer and payment in 1872 was limited to an *ex parte* motion asking for a hearing in September, 1876. He did not within a year after the passage of the Act of Congress of March, 1877, present his claim or proofs to the District Land officers.

Judgment affirmed.

We concur: McKee, J., Ross, J.

DEPARTMENT NO. 1.

[Filed June 30, 1880.]
[No. 7148.]

JOHNSON, APPELLANT, vs. SQUIRES, RESPONDENT.

PURCHASE OF STATE LANDS. Where neither the form nor the substance of the Act of the Legislature of March 28, 1868, relative to the purchase of State lands, have been complied with, one is not entitled to purchase under said Act.

CURATIVE ACT OF 1872. Said Act of March 27, 1872 (Stat. 1871-2), is not an amendment of the previous Act, but one designed for the relief of purchasers of State bonds, and has no application to *future* applications.

PURCHASE BY ACTUAL SETTLERS. By Article 17, Section 3, of the new Constitution, lands belonging to the State which are suitable for cultivation shall be granted only to actual settlers; and operates as well on applications made before as after the Constitution took effect.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

H. T. Hazard, for appellant.

R. M. Widney, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The parties have stipulated that the affidavits on which was based the application of respondent complied neither in form nor substance with the requirements of the Act of March 28, 1868. Respondent is not, therefore, entitled to purchase under the provisions of that Act. (*Hildebrand* vs. *Stewart*, 41 Cal. 387; *Cunningham* vs. *Crowley*, 51 Cal. 128.) Nor does his come within the class of cases provided for in the curative Act of March 27, 1872. (Stat. 1871-2.) Even if the language of the first section of that Act were ambiguous, the title illustrates its purpose—"*An Act for the relief of purchasers of State lands.*" It is difficult to believe, if the Legislature had intended to change the machinery by which such lands might thereafter be acquired, and to amend the law so that applications need no longer be accompanied by certain affidavits, that they would not in terms have amended the prior statute. If the Act of 1872 be construed as an amendment of the previous Act, it is apparent that those applicants who have since complied with the previous Act *as amended* require no "relief." To maintain the position of respondent, we must declare that the Legislature did, by the Act last cited, amend the previous statute; but this we cannot declare when to the improbability of an amendment so indirectly arrived at is added a consideration of the title of the Act, in itself totally inapplicable to *future* applications.

The application of plaintiff, we may assume, complied in form and substance with the law in existence when it was

made; yet we cannot determine that he is entitled to purchase, in view of the prohibitory provision of the Constitution: "Lands belonging to this State which are suitable for cultivation shall be granted *only to actual settlers*." (Article XVII, Section 3,) This language is clear and explicit, and operates as well on applications made before as after the Constitution took effect.

As the case shows, appellant has paid no portion of the purchase money, nor has his proposition to buy been accepted by the agent of the State. He has parted with nothing of value, and can neither assert that the State Constitution has "impaired the obligation" of a *contract*, or deprived him of property "without due process of law." It is admitted by the stipulation constituting part of the findings: "At the date of the application of Squires (defendant and respondent), neither plaintiff nor any one under whom he claims was in possession of said land, or any part thereof." It does not appear from the record, however, whether either party has been in possession since January 1, 1880. This could not appear, since the judgment of the District Court was rendered prior to that date. Nevertheless we must declare that the land can be granted only to an actual settler. Whether the land could be granted to an actual settler who had been wrongfully dispossessed need not now be decided. We only say that, under the present Constitution, the facts as to the possession of the respective parties must be "found" in all contested cases like the present.

The case must be remanded; and in the Court below the parties may respectively take such course as they may be advised in respect to motions for leave to amend or supplement their pleadings.

Judgment reversed, and cause remanded for a new trial.

We concur: McKee, J., Ross, J.

DEPARTMENT No. 1.

[Filed June 30, 1880.]

[No. 7149.]

JOHNSON, APPELLANT, vs. WRIGHT, RESPONDENT.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

H. T. Hazard, for appellant.

R. M. Widney, for respondent.

On the authority of *Johnson* vs. *Squires*, No. 7148, judgment reversed, and cause remanded to the Court below for a new trial.

IN BANK.

[Filed June 22, 1880.]

[No. 7090.]

THE PEOPLE EX REL. BECKWITH, PETITIONER, vs. THE BOARD OF EDUCATION OF THE CITY OF OAKLAND ET AL., RESPONDENTS.

LOCAL BOARD OF EDUCATION. The phrase "local Board of Education" means Boards having jurisdiction over a portion of a county, as of a city or township, and is not restricted to County Boards only.

IDEM—SELF-EXECUTING CLAUSES—POWERS. Section 7 of Article IX of the Constitution is self-executing; and local Boards of Education have power, in the absence of legislation, to adopt a series of text-books.

INCONSISTENT LAWS. The Act of December, 1875, providing that the text-books in use in 1873–4–5 shall continue in use until otherwise provided by statute, is inconsistent with the new Constitution, and is void.

Petition for writ of mandate.

A. A. Cohen, for petitioner.

G. L. Morgan, for respondents.

MYRICK, J., delivered the opinion of the Court:

This is an application for a writ of mandate directing the respondents to use and cause to be used in the public schools of the city of Oakland the text-books known as the McGuffey Series of Readers.

The facts upon which the application is based are as follows: During the years 1873, 1874, and 1875, and thence continuously until January 17, 1880, the McGuffey Series of Readers were by law in general use in the public schools of said city. At a meeting of the Board of Education of said city, held January 17, 1880, the said Board determined and resolved to adopt and introduce into general use as text-books in all the public schools of said city the text-books known as the Appleton Series of Readers, in lieu and in place of the McGuffey Series of Readers; which said resolution has been enforced, and ever since said day the said Appleton Series of Readers has been continuously and is used in said city, in lieu and in place, and to the exclusion of, said McGuffey Series of Readers.

The law under which the application for the writ is made is as follows:

By the Acts of March 14, 1868 (Stat. 1867–8, p. 161), and March 1, 1872 (Stat. 1871–2, p. 174), it was provided that the Board of Education of the city of Oakland shall have

sole power to determine what text-books shall be used in the schools of that city. By an amendment to Section 1521, Politieal Code, in effect from March 13, 1874, the State Board of Education was given the power to "prescribe and enforce the use of a uniform series of text-books in the public schools, except in the city and county of San Francisco." By the Act of December 13, 1875 (Stat. 1875–6, p. 1), it was provided that "the text-books in use in the public schools during the years 1873–4–5 shall be continued in use in all the public schools of this State until otherwise provided by statute."

The respondents rely upon Section 7, Article IX, of the new Constitution, claiming that it is self-executing, and that local boards have the right under it to adopt a series of text-books to be used within their respective jurisdictions. The section is as follows: "The local Boards of Education, and the Boards of Supervisors and County Superintendents of the several counties which may not have County Boards of Education, shall adopt a series of text-books for the use of the common schools within their respective jurisdictions; the text-books so adopted shall continue in use for not less than four years. They shall also have control of the examination of teachers and the granting of teachers' certificates within their several jurisdictions."

Several portions of Article IX are not self-executing; for instance, Section 5: "The Legislature *shall provide* for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year;" and at least part of Section 6, which provides that the public school system shall include such schools as *may* be established by the Legislature, etc. Here action by the Legislature may be necessary to give force and effect to the provisions. But it requires no legislation to give force to the last clause of Section 6—namely, that "the entire revenue derived from the State School Fund and the State school tax shall be applied exclusively to the support of primary and grammar schools." Section 8 requires no legislation to enforce it—namely, that "no public money shall ever be appropriated for the support of any sectarian or denominational school," and that no sectarian or denominational doctrine shall be taught in any of the common schools of the State. Neither does Section 9 require legislation, that "the University of California shall constitute a public trust; and that "no person shall be debarred admission to any of the collegiate departments of the University on account of sex."

Thus it will be seen that there are parts of Article IX which are self-executing, and that the system of common schools for which the Legislature is to provide does not embrace all matters referred to in the entire article. Let us see whether the section in question (Section 7) is self-executing: "The local Boards of Education * * * shall adopt a series of text-books," etc. There are local Boards of Education existing in this State, and their existence is here recognized, and reference is here made to them, as well as to such as may hereafter be created by the Legislature.

Section 1 of the Schedule provides "that all laws in force at the adoption of this Constitution, *not inconsistent therewith*, shall remain in full force and effect," etc. The Act of December 13, 1875, provided that the text-books in use in 1873–4–5 shall be continued in use until otherwise provided by statute. The new Constitution, which is of course above the statute, says that the *local boards* shall adopt a series of text-books. Here, then, clearly seems to be a power given. It does not say "in such manner as the Legislature *may* prescribe," but the local board "*shall adopt*." And the power thus given is inconsistent with the former statute; or, rather, that statute is inconsistent with the power given, and must yield precedence. It might very well be asked, What action of the Legislature is necessary to set this section in operation? Possibly the Legislature may prescribe rules by which boards shall be governed in selecting books—viz., to give notice, or to have the matter considered at some meeting called for the purpose, or other rule of machinery merely; but such legislation could not be used to take away the right of ultimate selection. Nor could the Legislature by non-action (even if so disposed) postpone or defeat the right or power of the boards to select. If it cannot postpone for ten years, how can it for thirty days? Evidently, in view of the legislation therefore had, the people, in adopting the new Constitution with the provision in question in it, intended to localize the selection of text-books, and authorize the selection to be according as the tastes or wishes or judgment of officers in different counties should determine to be for the best interests of education. The people of Sacramento County may prefer one set of books; of Siskiyou, another; of Los Angeles, another; of San Francisco, yet another. The evident object of the Constitution was to allow the exercise of such preference. The provisions of the new Constitution being mandatory, we do not see how the words "shall adopt" can be held to attend upon future legislation.

Some doubt has been suggested as to the meaning of the

phrase, "the local Boards of Education"—that is, does the phrase mean County Boards only, or does it include a board having jurisdiction over a portion of a county, as of a city or township. It was suggested that in Alameda County, for instance, there might be a general board for the county, a board for the city of Oakland, and a board for some particular township; in such case, which board would have authority to select text-books, and for what territory? We are of opinion that the phrase "local board" would apply to the territory over which it exercises jurisdiction as a board. The section says "within their respective jurisdictions." Each board, whether of a city, township, or county, is local as to the territory of its jurisdiction. The board in a city is local as to the city, the board of a township is local as to the township, and the board of a county is local as to the county; and where portions of a county are subject to local boards for such portions, the County Board is local as to the balance of the county.

Another point is suggested, in reference to which some difficulty arises; and although that point is not necessarily involved in the decision of the case before us, we will refer to it. In counties or parts of counties not within the jurisdiction of a local Board of Education, the County Superintendent and the Board of Supervisors are to adopt the text-books. The Supervisors have machinery for their meetings, and the Superintendents have machinery for their transactions. But where are they to act in concert? What machinery is to direct such action? Who is to record its proceedings? How is the voting to be had, whether by the Supervisors as a unit, or each to have a vote? If as a unit, and they differ from the Superintendent, who is to decide? Very likely, as to such cases, the section may not be self-executing. If so, we might have, arising from incompleteness, a section self-executing as to one class of officers, and not self-executing as to another. As to Boards of Education, the objections above noted do not apply; because they already have machinery for meeting, voting, and recording proceedings.

It has been urged that it could not have been intended that a Board of Education could without notice, at any meeting, transact such important business as that of selecting a series of text-books for the public schools, the books thus selected to be used four years without change, no matter what change might occur in the wishes of the board or the people, and no matter what change might occur in the prices to be demanded for the books. We can only say that all those matters were doubtless in the minds of the people in adopting the Consti-

tution, and that we must take the instrument as it is, giving to it such construction as its language will fairly and reasonably import, leaving its correction, if it should be found to need any, with that power which alone has authority to change or modify it.

It was conceded on the argument that the relator was a proper person to make the application, and that the writ of mandate is the proper remedy; therefore we express no opinion in relation to these points.

We deem it proper to say that at the time the facts of this case arose, there had been no action by the Legislature in regard to the subject under the new Constitution; and the fact of such non-action is deemed by us a material ingredient in reaching the conclusions above indicated. If the power to select books depended upon legislative action, non-action as to the mode might have defeated the exercise of the power.

The alternative writ heretofore issued is dissolved, and the application for a peremptory writ is denied.

We concur: Sharpstein, J., McKinstry, J., Thornton, J.

I concur in the judgment: McKee, J.

DEPARTMENT No. 1.

[Filed July 2, 1880.]

[No. 6736.]

HELLMAN, RESPONDENT, vs. ARPIN ET AL., APPELLANTS.

MORTGAGE OF LANDS IN THE POSSESSION OF ANOTHER. The mortgagee of lands in the possession of a person other than the mortgagor is put upon inquiry if the possession is open and notorious; but a finding of facts which does not necessarily determine such possession, as against a positive finding that the mortgagee had no notice of such person's claim, does not affect the mortgagee's rights.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

A. H. Judson, for respondent.

Bicknell & White and *J. S. Chapman*, for appellants.

MCKINSTRY, J., delivered the opinion of the Court:

It may be admitted that one who takes a mortgage of land in the sole and exclusive occupation of another than the mortgagee can disprove notice of that other's claim only by showing that he made every proper inquiry in respect to the rights of the possessor, and failed to obtain information.

That such be the effect of a possession, however, it must appear that the possession is open, visible, exclusive, and unambiguous. (3 Washburn on R. P. 284.) *Open* and *notorious* possession is sufficient to put a purchaser on inquiry. (19 Cal. 676; 29 Cal. 490.) The *sixth* finding of the Court below is as follows:

"That the defendant Arpin had resided on the land in controversy for several years prior to his deed to Levy, and has continued to reside thereon ever since, having a house on said land, and having cultivated the same every year, but not having the same inclosed; that he is an unmarried man, living alone, and frequently goes to the city of Los Angeles; and it did not appear whether he was actually on the land at the time the mortgage was executed, or whether he was temporarily absent therefrom."

We are not authorized to say that a finding of these facts necessarily determines the defendant's open and notorious possession, or conclusively determines that plaintiff was put upon inquiry, as against the positive finding (No. 7) that plaintiff, when he took and recorded his mortgage, had no notice of the claim of defendant Arpin.

Judgment and order affirmed.

We concur: McKee, J., Morrison, C. J.

Abstract of Recent Decisions.

OREGON SUPREME COURT.

CLOUD UPON TITLE. One owning wild lands which he holds by deed from one seized by deed is in such possession as to enable him to bring a suit in equity to remove a cloud from the title under Section 500 of the Code.—*Thompson* vs. *Wolf*, March 10, 1880.

EVIDENCE OF PEDIGREE. Declarations of deceased persons, or persons out of the State who were or are relations of a family, may be received as evidence of pedigree. But before such declarations can be admitted, the relationship of the declarant to the family must be proved by other evidence than his declarations.—*Id.*

BANKS—CONSTITUTIONAL LAW. Section 1 of Article XI of the Constitution of Oregon does not prohibit the establishment or incorporation of banks and moneyed institutions with the privilege of making, issuing, and putting in circulation bills, checks, certificates, promissory notes, etc., to circulate as money.—*State* vs. *Hibernia Savings and Loan Association*, March 10, 1880.

Legal Facetiæ.

SELF-DEFENSE TRIUMPHANT.

The *People* vs. *James Allerton* was a very interesting case, rendered so from the fact that the defendant acted as "his own lawyer" on the trial, without having the advantage of being one of the legal fraternity. His "summing up," of which we are able to give nearly a *verbatim* report, with the exception of the "acting," was decidedly rich, and afforded much amusement for the legal gentlemen present. The defendant, who is a small, red-haired, thin specimen of a Yankee, was indicted for an assault and battery on one Mr. Dodder. The facts, as divulged upon trial, are briefly as follows: The defendant is in the employ of the Mongaup Valley, Forrestburg, and Port Jervis Plank Road Company as a toll-gatherer, and resides upon the road, some miles above Port Jervis. He and the complainant, Mr. Dodder, are near neighbors. On a Sunday in February last the defendant saw the complainant in the act of beating his (defendant's) cows along the highway, and as an inducement for him to quit, hurled a few stones at him, one of which, as the complainant testified, struck him on the back of the neck.

The testimony being concluded, the defendant addressed the jury as follows:

"GENTLEMEN OF THE JURY—I don't know much about law, and since the trial has been going on I have concluded that I ought to know a little more. I ought to apologize perhaps for appearing in my own defense, and will do so by telling you that I feed one lawyer and hired another in this case; but they both come up missing when I need them most. I suppose I might have secured the services of some of these other 'limbs of the law' that I see around me; but, having been cheated by two of 'em, I concluded to go it 'on my own hook;' and here I am! I want to tell you, gentlemen, before I go further, that it is not my fault that this case is here taking up the time of this Honorable Court. I think you will give me credit for telling the truth when I say that it ought to have been tried before a Justice of the Peace, it being better adapted to the capacities of such a court than of this one. After this difficulty, Dodder did get a warrant for me from Squire Cuddeback, over in Deerpark. He then charged that I had assaulted him; but five or six months have freshened his recollection, and he now says that

I assaulted and battered him. I believe there is some difference between the two charges.

"Dodder says he swore to the complaint before Squire Cuddeback, and I leave it for you to say whether he tells the truth now in saying that I battered him. I was taken by a constable before the Squire; and either because the Justice was ashamed of what he had already done, or hadn't time to attend to it (I don't know which), it went down. Two or three weeks after that I was arrested again; and my wife having been confined, I thought it best, as a dutiful husband, to be around home, so I got rid of it by giving security for my appearance to court.

"You know, gentlemen, that I am in the employ of the Mongaup Valley, Forrestburg, and Port Jervis Plank Road Company as a gate-keeper. This company, it seems, had sufficient confidence in my integrity and honesty to place me in that important station; and even if I should receive $3,000 and steal $1,500 of it, that's between me and the company, and its none of Dodder's business. Now, when the company sent me up along this road to collect tolls, this Dodder was one of the inhabitants I found there in the woods, and I will say for him that he is a very fair specimen of the rest of the population. But there isn't any of them that seem to appreciate all the benefits of this plank road.

"It let out to civilization a class of people who never before realized the idea that there was such a thing as civilized life, and this Dodder is one of them. It is a fact that soon after I moved there a young woman, seventeen years old, came down out of the mountains on the plank road one day, and said she had never been out before. She fairly seemed surprised to see a white man, and after asking a few questions went back into the woods. This Dodder was my nearest neighbor, and a good deal nearer than I wanted him; and I hadn't been there long before I heard he had been lying about me to one of the directors, and I soon found out that he wanted to get his son, who was sworn here against me, in my place. But he hasn't done it yet; and if you don't convict me, I reckon he won't very soon.

"It won't take long to dispose of Dodder No. 2. He testifies that he saw me throw three stones at his father, and saw the 'old man dodge.' On his cross-examination he says that he was in his own house in the woods, and had to look over a hill twenty feet high, and also over three slab fences and two stone walls! Well, if he tells the truth, all I wish is that I had young Dodder's eyes. He is certainly a remarkable boy, and can't consistently deny his '*father*.'

"I am willing to admit that I did wrong to throw stones at Dodder, and I apologize to all the world—and this Court particularly—for it. The doctors tell us that there are two causes for all diseases—predisposition and excitability. I think it was the latter cause that moved me to stone Dodder. I therefore confess myself guilty of the assault; but the battery I deny; and if you find me guilty of the battery, I will appeal from the decision to the court of high heaven itself before I will submit to it.

"Now, gentlemen, you saw Mr. Dodder and heard him swear against me. I asked him a great many questions, and I was sorry to hear him answer as he did. I might have asked him if he didn't kill my cat, and if he didn't stone my chickens because they trespassed in his woods, where actually the rocks are so thick that the brakes can't find their way through them; but then I knew he would deny it, and it would grieve me to hear him. He admits that he was driving my three cows up the road, and that he struck at one of 'em, but says it was with a small switch. I have proved that this switch was a pole about ten feet long, and about three inches across the butt-end; and I have also proved that, when he struck, the cow fell. It is true, my witness couldn't swear that the stick hit her, he was so far off; but take the blow and the fall together, and we can guess the rest. If you, gentlemen, should see me point a gun at a man and pull the trigger, see the flash and hear the report, and at the same time see the man drop, I think you would say that I shot him, although you might not see the ball strike him.

"Now the fact is, gentlemen, that on Sunday I was lying on my lounge in my house, when my wife said to me that Dodder was chasing my cows. I jumped up and pulled on my boots and went out of doors, and saw Dodder and the cows coming up the road. It is true, he says he was not driving them, but he says he and the cows were both going along the road in one direction, and this was as near as I could get him to the cows or the truth; but it is proved that the cows were going ahead of him, and he was following after them, striking at them with this little switch ten feet long, three inches across the butt, and I guess you'll think he was 'driving' them. I sung out to him, 'Dodder, stop!' but he didn't obey my order, and I just threw a stone in that direction, which went about ten feet over his head, at the same time going toward him, while he was coming toward me. He paid no attention, and I sung out again, 'Dodder, stop!' Still he didn't mind me, and then I just threw another stone; but on he came and on I went; and I threw the third

stone, which he says hit him in the back of his neck, but which I think is rather strange, as we were going toward each other as fast as we could. But he never slacked up, and by this time we were within about eight feet of each other. I halted and hollowed at the top of my voice, 'Dodder, why in —— don't you stop?' About then he did stop, and raised his ten-foot switch as if to strike me. I sang out, 'Mr. Dodder, look out! You may wallup my cows, but if you wallup me with that switch you'll wallup an animal that'll hook!'" Here the orator made an appropriate gesture of the head, as in the act of hooking, which was followed with uncontrollable laughter that continued several minutes.

"Now, gentlemen, if you convict me, this Court can fine me $250 and jug me for six months; and if you really think I ought to be convicted of this assault, say so; for I am in favor of living up to the laws as long as they are laws, whether it is the Fugitive Slave Law, the Nebraska Bill, or the Excise Laws. I will read you a little law, however, which I have just seen in a book I found here." [The speaker here picked up a law book and read as follows]: "'Every man has a right to defend himself from personal violence.' Now, I don't know whether that is law or not, but I find it in a law book." [A veteran member of the bar, who was sitting near the speaker, remarked to him that it was good law.] "Well, gentlemen, here is an old man, who looks as if he might know something, and he says this is good law. Now, if you will turn to Barbour something, page 399, you'll find the same doctrine is applied to cattle. (Great laughter.) Therefore, I take it, I had a right to defend my cows against Dodder's ten-foot switch. Why, gentlemen, nearly all my wealth is invested in them three cows, and you can't wonder that I became a little excited when I saw Dodder switching them with his ten-foot pole. I am a poor man, and have a large family consisting of a wife and six children, which I reckon is doing pretty well for as small a man as I am; and I could not afford to let Dodder kill my cows!

"Now, gentlemen, I don't believe you'll convict me after what I have said; but if you do, and this Court finds me $250, I shall 'repudiate,' because I can't pay. And if I'm jugged for six months, why, these Dodders will have it all their own way up there. But, notwithstanding all this, I am willing to risk myself in your hands; and if you think I ought to have stood by and not done anything when I saw Dodder hammering my cows, why then I am 'gone in,' toll-gate and all.

"It is true I am a poor man, but not a mean one. The name of Allerton can be traced to the "Mayflower." When she landed the Pilgrims on Plymouth Rock, among the passengers was a widow, Mary Allerton, with four fatherless children, and I am descended from that Puritan stock; and from that day to this there has never lived an Allerton who hadn't Yankee spirit enough to stop a Dodder from polling his cows. I'm done."

Here the laughter was exceedingly boisterous, in which all participated; and it was several minutes, despite the repeated cries of "Order, order" by the Court, before order could be restored. Our eloquent and usually unvanquishable District Attorney, fearing to cope with so formidable an antagonist, merely remarked, "It is a plain case," etc., and left it to the jury, who promptly brought in a verdict of "not guilty."—*Chicago Legal News.*

A COLORED minister in Georgia was brought to trial before the deacons of his church for stealing bacon. After a number of witnesses had been examined the deacons retired, and afterward returned the following verdict: "The Rev. Moses Bledso am acwitted of the sinuations dat he actual stole de pork, as 'twas not shode dat sumbody else miten't have been wearin' his cloze; but de brudder is hereby 'fectionately warned dat in future he must be more keerful."

IN Mississippi a man was on trial for larceny. His sanity was doubted by some, and the District Attorney thought it best to prove it, and put the following question to one of his leading witnesses; "Do you think the prisioner can distinguish between right and wrong—can tell the difference between good and bad?" Witness: "I think he can, sir; for I saw him take a drink of whisky, and he said it was good whisky; and from the circumstance I should infer that he could 'tell the difference between good and bad.'"

A COLORED man in Mississippi being on trial for working on Sunday, his counsel pleaded in mitigation that he had formerly lived in Arkansas, where Sunday was little more observed than other days of the week. In his charge to the jury the Judge said: "The prisoner may not have known that he was breaking human law, * * * but he certainly knew he was breaking the ten commandments." Whereupon the prisoner, seeing the penitentiary staring him in the face, sprang to his feet, and with upraised hands exclaimed: "Fore God, Judge, I didn't know it; *they was passed while I lived in Arkansaw.*"

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Current Topics.

ONE of the most important questions of practice, respecting the removal of causes from the State to the Federal Courts, that has come under our observation was recently before Judge SAWYER, of the U. S. Circuit Court, in the case of *Gibbons* vs. *Sheehy*. The facts are substantially as follows:

An action was brought in the State Court to recover $15,000 damages for breach of contract of purchase and sale of two mining claims. One of the defendants, Sheehy, before the trial or final hearing, filed his petition, under subdivision 2 of Section 639, U. S. R. S., in the State Court, praying the removal of the cause, "so far as it relates to him," to this Court. At the same time he appeared, filed his bond in due form, gave notice of motion to remove, and made such motion accordingly. No exception was taken to his sureties or bond. His petition shows all the facts necessary to bring his application within said subdivision, to-wit: (1) That said action was pending; (2) That the alleged cause of action was as above stated; (3) That the matter in dispute exceeds $500, exclusive of costs; (4) That petitioner is an alien—a subject of Victoria I., Queen of Great Britain; (5) That no trial or final hearing has been had; (6) That his co-defendant is a citizen of the State wherein said action was brought; (7) That, so far as the action relates to petitioner, it is a suit "in which there can be a final determination, so

far as concerns him, without the presence of his" co-defendant as party in the cause—the alleged sale of said mining claims—to recover the purchase money for which the action is brought, being by four separate deeds, upon four separate considerations, for four separate distinct number of feet in said distinct mines, by plaintiffs to defendants separately and in severalty. The State Court refused to make an order of removal. Defendant Sheehy then obtained a certified copy of the record, filed it in this Court, and gave plaintiffs notice thereof. Plaintiffs then moved to remand, on the ground:

"Because the application to remove said cause from said Superior Court, and the order denying said application, has not been reversed or set aside, and no process has been issued from this or any Court requiring said cause to be removed to this Court."

The complaint alleged that the action was upon a *joint and several express contract.* The material inquiry was whether the suit was one in which there could be *a final determination* of the controversy, *so far as concerns the defendant Sheehy*, without the presence of the other defendant as party to the cause. It was contended by the plaintiffs that the action being one upon a *joint and several express contract*, there could not be a final determination of the controversy so far as any one defendant was concerned, and therefore such a case was not one contemplated by subdivision 2 of Section 639, U. S. Rev. Stats. The defendant insisted that *a joint or joint and several obligation* is one which is removable.

J. A. Smyth, Esq., and H. S. Dixon, Esq., attorneys for defendant Sheehy, cited in support of their position: Freeman on Judgments, Sec. 235; *United States* vs. *Cushman*, 2 Sumner, 426; C. C. P., 383–414; *Kelly* vs. *Bandini*, 50 Cal. 530; *Sands* vs. *Smith*, 1 Dillon, 290; *Allen* vs. *Ryerson*, 2 Deady, 503; *Taylor* vs. *Rockafeller*, 6 Reporter, 226; *Wormser* vs. *Dahlman*, 7 Reporter, 740; *Goodnough* vs. *Warren*, 3 Pac. Coast Law Journal, 255.

The motion to remand was denied.

Supreme Court of California.

DEPARTMENT NO. 2.

[Filed June 24, 1880.]

[No. 6762.]

MANLY, APPELLANT, vs. HOWLETT, RESPONDENT.

ANTAGONISTIC FINDINGS AS TO POSSESSION. Where a defense is based upon a gift or the Statute of Limitations, proof of possession is essential to either; and where the findings upon the question of possession are contradictory and antagonistic, a judgment in favor of the defendant based upon them cannot stand.

ESTOPPEL—EQUITABLE DEFENSE. An estoppel or equitable defense must be pleaded.

GIFT OF LAND BY PAROL. When the owner of land gave the same by parol to another, who went into possession and occupied it, made improvements, and paid a portion of the taxes, it was a gift so far executed as to entitle the donee to a specific performance; but if at the time of the gift the donor was a joint owner with another who did not join in the gift, no more than the donor's interest could have passed.

STATUTE OF LIMITATIONS—CERTIFICATE OF PURCHASE—TITLE—PATENT. A certificate of purchase does not pass the title *as title*. Title remains in the State until the issuance of a patent. Before the patent issues, the Statute of Limitations might build up a title in the possessor as between the parties as to the *then* condition of things; but after the issuance the patentee and his grantees have superior rights to any theretofore held.

IDEM. In a suit for the recovery of lands commenced after the issuance of the patent, the Statute of Limitations cannot be held to have commenced running prior to the date of the patent.

Appeal from the District Court of the Sixteenth Judicial District, Kern County.

Stetson & Houghton, for appellant.
P. T. Colby and *V. A. Gregg*, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an action of ejectment to recover the possession of two lots of land situate in Bakersfield, Kern County, together with rents and profits. Plaintiff alleges that on the 11th of December, 1879, he was, has been ever since, and is the owner, and is entitled to the possession of the lots; and that on that day defendants were, since have been, and are in the adverse, wrongful, and exclusive possession of the lots. The answer of defendant Howlett denies the ownership of plaintiff, admits his own possession, alleges that he is lawfully in possession, denies the damage, and the value of the rents and profits to be $100 per month, and denies every

other allegation of the complaint. Defendant alleges that plaintiff's cause of action is barred by Sections 318 and 319, C. C. P., and that he (Howlett) is the owner, and has been in the open, notorious, and exclusive possession under claim of title, exclusive of every other right, ever since November, 1871. and that he has paid all taxes.

The Court filed its findings of fact as follows:

"1. That each and every allegation of plaintiff's complaint are untrue.

"2. As to the rents and profits.

"3. That the defendant Howlett is the owner and entitled to the possession of the property described in the complaint.

"4. That defendant Howlett has been in the open, notorious, and exclusive possession of the property, with a claim of title (being a gift from Julius Chester in August or September, 1871), since November, 1871, holding the same adverse to plaintiff, his ancestors, predecessors in interest, and grantors.

"5. As to payment of taxes.

"6. That plaintiff's action is barred by Sections 318 and 319, C. C. P., defendant having held said property adverse to him more than five years immediately preceding the commencement of the action.

"7. That the allegations of defendant Howlett's answer are true."

Upon these findings judgment went for defendant. Plaintiff moved for a new trial, which was denied, and plaintiff appealed.

Without directly passing upon the sufficiency of each of these findings, as findings of facts, which seem to us to be quiet insufficient, the judgment based upon them cannot stand. In the first finding the Court found that "each and every allegation of plaintiff's complaint are untrue;" among other allegations, that defendants on the 11th of December, 1878, were and since have been and are in the adverse and exclusive possession of the land; and in the seventh finding the Court found that "all the allegations of defendant Howlett's answer are true"—viz., that he (Howlett) is and has been in the exclusive possession of the property ever since November, 1871. In other words, plaintiff's allegation that Howlett was and is in possession is untrue, but Howlett's allegation that he was and is in possession is true. Howlett's defense was based on two propositions—viz., a gift, and the Statute of Limitations, to either of which possession was essential; therefore the Court should have found whether or not he was in possession. When findings are directly antag-

onistic, it cannot be said that either finding is correct, or at least which is correct.

Other matters appear in the transcript; and as the case must go back for a new trial, we will refer to them.

The plaintiff claimed title deraigned as follows: A certificate of purchase issued by the Register of the State Land Office (swamp and overflowed lands), June 6, 1870, to Baker; deed, Baker to Livermore and Chester, January 4, 1871, and from Livermore and Chester, July 3, 1873, and by mesne conveyances to plaintiff, December 7, 1878; State patent to Baker, December 12, 1877. The suit was commenced January 7, 1879.

Defendant claimed on the trial (though the defense was not set up in his answer) that in August or September, 1871, Chester made a parol gift of the land to him, and that in November, 1871, he took possession, made some improvements, and during succeeding years made considerable improvements, and has been in the continued occupation of the premises, claiming title. Defendant pleaded the Statute of Limitations, and relied also upon his exclusive adverse possession of more than five years. Plaintiff objected to these defenses: 1. That the estoppel or equitable defense has not been pleaded. 2. That the Statute of Limitations did not begin to run until the issuance of the patent, December 12, 1877, the suit having been commenced after that, and being founded upon it.

In regard to a gift of land by parol, it was held in *Freeman* vs. *Freeman*, 51 Barb. 306, that when the owner of land gave the same by parol to another, who went into possession of the land and occupied it, made improvements and paid a portion of the taxes, it was a gift so far executed as to entitle the donee to a specific performance. In the case at bar this defense was not pleaded. Even if it had been pleaded, it would not have justified the judgment, for the reason that at the time of the alleged gift Livermore and Chester were joint owners of whatever right had then accrued from the State. It is not claimed that Livermore joined in the gift; and therefore no more than Chester's interest could have passed.

In regard to the Statute of Limitations, we are of opinion that the certificate of purchase did not pass the title *as title*. Subsequent acts were to be performed by Baker before he would be entitled to the patent—viz., payment of the annual interest and of the deferred purchase money. The title was in the State until the issuance of the patent.

It is true that before the patent should issue, the Statute

of Limitations might build up a title in the possessor as between the parties, so as to determine their rights upon the *then* condition of things; but the issuance of the patent gave new rights. The patentee and his grantees then had a right superior to any theretofore owned or held by them—viz., the ownership of the land. They then had something which the State had not theretofore parted with. In a suit for the recovery of the land commenced after the issuance of the patent, the Statute of Limitations cannot be held to have commenced running prior to the date of the patent. (47 Cal. 570; *Hagar* vs. *Spect*, 48 Cal. 406; 49 Cal. 12; *Henshaw* vs. *Bissell*, 18 Wall. 255.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT NO. 1.

[Filed July 20,1880.]

[No. 6747.]

WM. P. HARKEY, APPELLANT,

vs.

J. W. HUMPHREYS, RESPONDENT.

PRACTICE—EVIDENCE. Testimony in proceedings for unlawful detainer, showing that a sale to plaintiff was not followed by an actual or continued change of possession of the property, is admissible, although the sale is not disputed in the answer of defendant.

Appeal from the District Court of the Tenth Judicial District, Sutter County.

L. J. Ashford, for appellant.
Statler & Bayne, for respondent.

ROSS, J., delivered the opinion of the Court:

The complaint charges that on the 18th day of November, 1878, the plaintiff was, and for a long time prior thereto had been, the owner and in possession of a certain lot of stock cattle and calves. That on the day mentioned, in the county of Sutter, the defendant wrongfully took the property from the possession of the plaintiff, and still unlawfully detains the same, to plaintiff's damage, etc. Answering the complaint, the defendant averred that at the times therein mentioned he was Sheriff of Sutter County; that on the 16th day of October, 1878, one Ashford recovered judgment in the Tenth

District Court against one W. F. Nelson for a certain sum of money, which judgment was on the same day entered on record and duly docketed; that afterwards, and on said 16th day of November—no part of the judgment having been paid—Ashford caused an execution to be duly issued upon the judgment, and directed and delivered to the defendant; "that in obedience to the commands of said execution, this defendant, as such Sheriff, on the 18th day of November, 1878, seized upon and took into his possession the cattle and calves in the complaint mentioned, and levied the said execution upon the same, and afterwards, on the — day of November, 1878, after due and legal notice given, sold the said cattle and calves to satisfy said execution, as the property of said W. F. Nelson, whose property the said cattle and calves then were. * * * That said seizing, levying upon, and selling said cattle and calves is the same taking and detention thereof in the complaint complained of."

On the trial the plaintiff testified that he bought the property in question from Nelson, "excepting the calves and two or three yearlings that were raised from the cows," and was the owner thereof at the time of the levy and sale. The defendant offered in evidence the judgment roll in *Ashford* vs. *Nelson*, and also offered testimony tending to show that the sale by Nelson to the plaintiff was not followed by an actual or continued change of possession of the property—all of which testimony was excluded by the Court below, on the ground that the sale from Nelson to plaintiff was not assailed in defendant's answer.

In the recent case of *Grumm* vs. *Barney*, No. 6405, we had occasion to consider the same question, and there held that the defendant was not bound to anticipate the case of the plaintiff, nor to assume under whom he claimed title. We are entirely satisfied of the correctness of that decision, and its results that the Court below erred in the rejection of the proffered testimony. The circumstance mentioned by the learned Judge who tried the cause—to the effect that even if the excluded testimony was admitted and considered, he should still have to find that there was a continued change of possession—cannot, it is obvious, avoid the necessity of a reversal of the judgment and order. The evidence ruled out was competent and material, and the defendant had a right to have it admitted and considered. The *effect* to be given to it, when admitted, is altogether another question.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed June 22, 1880.]

[No. 7060.]

THE BANK OF CALIFORNIA, PETITIONER,
vs.
SHABER, TREASURER, RESPONDENT.

MANDAMUS. Where bills had been passed upon and audited by the Board of Supervisors, and the certificates thereof duly assigned to the relator: *Held*, that on refusal of the County Treasurer to pay the same, mandamus was the proper remedy.

DAMAGES. A claim for damages caused by mobs or riots need not be presented in the first instance to the Board of Supervisors for their rejection or allowance, as in the case of other demands against the city and county; but a judgment must first be had, which the Board of Supervisors *must* allow, and the Treasurer must pay after the same has been audited.

CITY AND COUNTY ATTORNEY. This officer cannot act independent of and against the directions of the Board of Supervisors; and hence, where the Board determine not to proceed further in the prosecution or defense of a suit, the City and County Attorney must be governed by such determination, and cannot appeal.

BOARD OF SUPERVISORS. The action of the Board in allowing claims in judgment is conclusive, and the Treasurer is estopped from questioning its correctness.

Petition for writ of mandate.

Cope & Boyd and *Wilson & Wilson*, for petitioner.
John Luttrell Murphy, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an application for a mandamus to compel the respondent, as Treasurer, to pay a certain claim out of moneys in the Treasury.

It appears from the petition that on the 13th day of July, 1878, one J. C. Smith commenced an action against the city and county of San Francisco, in the District Court of the Fifteenth Judicial District in and for said city and county, to recover damages for injuries to property in said city and county caused by mobs and riots, which action was defended by said city and county; that such proceedings were had therein that said Smith recovered a judgment against said city and county for $65,273.76 damages and $912.50 costs, which judgment was entered August 26, 1879; that on the 1st day of September, 1879, said Smith presented to the Board of Supervisors of said city and county a certificate of the presiding Judge of said Court, a certificate of the Clerk of said Court, and a copy of the judgment roll in said action,

together with a written demand, verified, for the payment of said judgment; that on the 30th of October, 1879, said Board of Supervisors, acting on the opinion and advice of the then Attorney and Counselor for said city and county, and being satisfied that any further proceedings in said action on the part of said city and county would be unsuccessful, determined that said judgment should be paid, and thereupon an ordinance or authorization to that end was adopted by said Board and approved by the Mayor; that the said claim was duly presented to the Auditor of said city and county, who duly endorsed the same "allowed," with date and proper fund; that afterwards, November 11, 1879, the claim was presented to the then Treasurer of the said city and county for payment, but there being no moneys with which to pay the claim, the same was duly registered by said Treasurer; that after such registration the said Smith duly assigned said claim to petitioner for value; that on the 15th of January, 1880, petitioner presented the claim to respondent, the present Treasurer, for payment, which payment was refused; and that at the last named time there was sufficient money in the treasury, properly applicable, with which to make the payment; that said Board of Supervisors never authorized any appeal from said judgment to be taken.

The respondent resists the application for the writ upon two grounds, viz.:

"1. That neither the judgment nor the claim based upon the judgment is an existing or valid claim against said city and county.

"2. That on the 15th of July, 1880, the said city and county duly appealed from the judgment of said District Court to this Court, which appeal is now pending in this Court undecided."

First. As to whether the claim referred to was or is a valid claim against said city and county.

Section 71 of the Consolidation Act authorizes the Board of Supervisors to levy taxes "for the payment of all demands upon the treasury thereof, authorized by law to be paid out of the same." Section 4452, Political Code, provides that "every municipal corporation is responsible for injuries to real or personal property situate within its corporate limits, done or caused by mobs or riots;" and according to Section 4453, Political Code, the action must be tried in the county where the occurrence took place. Section 4455, Political Code, provides that "on the certificate of the presiding officer, or of the clerk of the Court in which the judgment is

rendered, the Board of Supervisors of the county, or the legislative authority of the city, must by ordinance direct and cause to be issued a warrant for the payment thereof on the general fund, and the same must be paid in its regular order, as other warrants of the municipal corporation are paid." According to the Act of April 23, 1858 (Stat. 1858, p. 235), the Board of Supervisors of the city and county of San Francisco has power "to order paid any final judgment against said city and county." Section 84 of the Consolidation Act requires that every demand upon the treasury must, before it can be paid, be presented to the Auditor of the city and county of San Francisco to be allowed.

From these statutes it will be perceived that a claim for damages caused by mobs or riots is not to be presented in the first instance to the Board of Supervisors for their rejection or allowance in whole or in part, as in the case of the general demands made against the city and county; but a judgment must first be had, which is an adjudication upon the merits and legality of the claim; and after the judgment is rendered, the Board of Supervisors have no claim to "allow"—that is, no claim which they can say that they will cause to be paid or not, as they may deem just, but the claim is one which they *must* order to be paid, unless they shall determine to test the correctness of the judgment on appeal to the Supreme Court; that their discretion extends only to the question whether or not they will appeal; that if they determine not to appeal, they must order, in usual course, the claim to be paid. After the order of payment is made by the Board of Supervisors, the claim must go to the Auditor for his scrutiny, and when approved by him it must be paid by the Treasurer in due course. In this case it appears that this claim went through each and all of the steps requisite before payment, which leads us to the consideration of the other objection made by the respondent, namely:

Second. That there has been an appeal from the judgment of the District Court to this Court.

It appears from the papers on file that at the time the Board of Supervisors was considering the question whether it would order the payment of the judgment, the expediency of an appeal was considered, and a committee of the Board conferred with the then Attorney and Counselor of the city, and the result was that, instead of directing an appeal to be taken, the Board ordered the judgment to be paid. It also appears that no order or authorization of the Board that an appeal be taken has ever been given. The appeal was taken (so far as it is an appeal) by the Attorney

and Counselor of said city and county, upon his own responsibility, upon his own judgment, and in accordance with what he deemed to be his official duty, more than two months after the claim had been registered for payment, on the same day on which it was last presented for payment. Let us then see if he had authority so to do.

The Act of 1862 (Stat. 1862, p. 98) created the office of Attorney and Counselor of said city and county without defining his duties. An amendment to that Act was passed April 27, 1863 (Stat. 1863, p. 771), defining his powers and duties as follows: "Said Attorney and Counselor shall perform such duties as Attorney and Counselor in and for said city and county as the Board of Supervisors of said city and county shall from time to time prescribe."

Thus it will be seen that while he holds his office independent of a tenure derived from the Board, he must receive from the Board directions as to such duties as he may be called upon to perform. He cannot act independent of and against the directions of the Board. The office of the Attorney and Counselor of the city is continuous, even though different persons may be incumbents at different times; and if, in any given matter, general directions are given by the Board to the Attorney and Counselor that he attend to and defend or prosecute a suit, it might be implied that he had authority to take such steps and pursue such course as his judgment should direct, to a final conclusion; but if at any time the Board should determine not to proceed further in the prosecution or defense of a suit or other matter, such determination by the Board is binding upon the Attorney and Counselor, and he must be governed thereby.

In this case the determination of the Board not to prosecute an appeal, and the making of the order for the payment of the claim, terminated the functions of the Attorney and Counselor in regard to the suit and its conduct, and he was relieved of all further responsibility in the matter. He had no authority to review, reverse, or postpone the action of the Board; its order was a determination not to appeal, but that the judgment should be paid, and an expression of opinion on its part that an appeal would be ineffectual; and the appeal thereafter taken by the Attorney and Counselor, being without authority, cannot and does not stay the enforcement of the order of the Board. No act of fraud is alleged as to any party.

It may be added that the city by its proper officers having in effect determined not to appeal from the judgment, and having by resolution directed that the amount of the judg-

ment be paid (the Board having the power so to do), and it appearing that the petitioner, relying upon this action of the Board, bought the claim for value, we think respondent is estopped from now contesting the validity of the judgment.

In support of the views herein expressed, reference may be had to the following authorities: *People ex rel.* vs. *Fitzgerald*, Treasurer, 54 How. Pr.; *Board of Supervisors* vs. *Bowen*, 4 Lansing, 31; *People ex rel.* vs. *Lawrence*, 6 Hill, 244; *El Dorado County* vs. *Elstner*, 18 Cal. 144; *Supervisors* vs. *Briggs*, 2 Denio, 26; *Martin* vs. *Supervisors*, 29 N. Y. 645.

In *Board of Supervisors* vs. *Bowen*, 4 Lansing, 31, the Court says: The powers of a county, as a body politic, can be exercised only by the Board of Supervisors. When this Board is sued, the county is sued. The corporation, having the power to sue and be sued, has power to terminate the litigation. It would be a most extraordinary doctrine to hold that, because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and had no power to terminate it.

In the *People ex rel. etc.* vs. *Fitzgerald*, 54 How. Pr. 1, where bills had been passed upon and audited by the Board of Supervisors, and the certificates thereof duly assigned to the relator, held that on refusal of the County Treasurer to pay the same, mandamus was the proper remedy. The action of the Board was conclusive, and the Treasurer is estopped from questioning its correctness.

Let the writ issue.

I concur: Morrison, C. J.

I concur, and will at some future day soon express my views: Thornton, J.

I concur in the judgment: McKinstry, J.

DISSENTING OPINIONS.

I dissent. I think the writ should be denied for the reason that we cannot, in this proceeding, treat the appeal taken by the City and County Attorney as a nullity. In my opinion, however, when the Board of Supervisors directed the judgment that had been recovered by Smith against the city and county of San Francisco to be paid, it was in effect an ending of the controversy, and a determination by that body not to take an appeal from the judgment. And I think it cannot be doubted that the Board of Supervisors had the power to stop the litigation by directing payment of the judgment rather than put the city and county to further cost in the

prosecution of an appeal which, as shown by the record in this proceeding, they considered after consultation with the late City and County Attorney, who was the attorney who tried the cause, would be a fruitless appeal. (*Board of Supervisors of Orleans County* vs. *Bowen*, 4 Lansing, 30, 31.) The record here shows that after this action on the part of the Board of Supervisors, and after the resolution directing payment had been approved by the Mayor, and after the claim had been presented to the Auditor and endorsed "allowed," and after it had been presented to the Treasurer for payment, and by the latter official duly registered, but not paid for want of funds, the petitioner, the Bank of California, in good faith and for value, purchased the demand. Subsequent to all this the present City and County Attorney, of his own motion and in pursuance of what he deemed his duty, took an appeal to this Court from the judgment. The appeal was not directed or authorized by the Board of Supervisors, and the action of the City and County Attorney in that regard was in conflict with the previous action of the Board respecting the matter. Nevertheless an appeal was taken by the law officer of the city and county, and is still pending; and as long as it exists I do not see how the Treasurer can be compelled by mandamus to pay the claim. I think it proper, however, to say that the appeal should, in my judgment, be dismissed on motion; for I think that, in view of the facts appearing, the city and county would be estopped from further questioning the legality of the demand even had the Board of Supervisors authorized the appeal, which, as we have seen, it did not do. (*People ex rel.* vs. *Fitzgerald*, Treas., 54 How. Pr. 1; *Martin* vs. *Supervisors*, 29 N. Y. 645; *El Dorado Co.* vs. *Elstner*, 18 Cal. 144; *Board of Supervisors* vs. *Bowen*, 4 Lansing, 31.) Ross, J.

I dissent. In my opinion this application cannot be granted consistently with the law relating to mandamus.

1. If the act is not one which the law especially enjoins the performance of by the Treasurer as a duty resulting from his office, the writ ought not to issue. (C. C. P., 1085.)

It is conceded that an appeal is pending in this Court from the judgment which the Board of Supervisors ordered to be paid, and which the Treasurer refuses to pay because of the pendency of such appeal. One effect of an appeal is to stay all further proceedings upon the judgment appealed from until the determination of the appeal. If we accord to this appeal that effect, it operated *ipso facto* as a stay from the time it was perfected. That such was and is the effect

of it, seems too plain for argument. But it is contended, however, that the appeal was improperly taken, because the Board of Supervisors did not direct it to be taken, but, on the contrary, ordered the judgment to be paid before the appeal was taken. Was that a proper matter for the Treasurer to determine? If, instead of an appeal being taken, an injunction which forbade his paying the judgment had been served upon him, no one would claim that he might disregard that on the ground that the case was not one in which an injunction could properly issue. Nor would a court compel him by mandamus to pay the judgment after being so enjoined, although it was apparent that the injunction was improperly granted. If the Treasurer himself was not authorized to determine the validity of the appeal, the Court in this proceeding will not determine it. What he was not fully authorized and bound to do without the command of this Court, this Court will not command him by mandamus to do. If there be any doubt as to the duty of an officer to act in a given case, courts will not by mandamus compel him to act. Before we can grant the application in this case, we must determine that the appeal was improperly taken, and that, too, in a proceeding to which the officer taking the appeal is not a party. It does not seem to me that an appeal to this Court can be virtually dismissed in a case where its validity is only collaterally involved. I think it can only be done in a direct proceeding instituted for that purpose. To grant the writ prayed in this case is to decide that the Treasurer was bound to determine whether the law officer of the city, whose chief duty it is to act as the legal adviser of the other officers, transcended his authority in taking an appeal to this Court. If it was not the duty of the Treasurer to determine that question, then there is no ground for the issuance of a writ of mandamus to him in this case.

2. It does not appear in this case that the plaintiff has not had a plain, speedy, and adequate remedy in the ordinary course of law. (C. C. P., 1086.) If the appeal pending in this Court is here under circumstances which will justify this Court in disregarding it to the extent demanded by the plaintiff, then this Court would upon a single motion dismiss it. Can any remedy more plain, speedy, and adequate than that be devised? And that, too, would be in the ordinary course of law. It cannot reasonably be supposed that this Court would hesitate to dismiss an appeal taken without authority. If the City and County Attorney had no authority to take this appeal, the Court, upon being satisfied that he had not, would promptly dismiss it. And the want of

authority to take the appeal is the only ground upon which it is even suggested that the Court can grant this application. Then why not attack the validity of the appeal directly instead of collaterally? Why proceed against an officer who had no hand in that matter, instead of against the one who is wholly responsible for the appeal?

To accomplish indirectly by mandamus what can be accomplished directly by a simple motion is, as I view it, to reject a plain remedy and resort to a doubtful one. This the statute does not sanction. "The existence or non-existence of an adequate and specific remedy at law in the ordinary forms of procedure is therefore one of the first questions to be determined in all applications for the writ of mandamus; and whenever it is found that such remedy exists, and that it is open to the aggrieved, the courts uniformly refuse to interfere by the exercise of their extraordinary jurisdiction." (High's Extraordinary Remedies, 17.)

I am not satisfied that it was the duty of the Treasurer to disregard the stay which the appeal from the judgment created, and I am perfectly satisfied that the plaintiff, upon its own theory, has a plain, speedy, and adequate remedy by a motion to dismiss the appeal, which constitutes the only obstacle to the payment of the judgment. Therefore I think that the application for the writ of mandamus in this case should be denied. SHARPSTEIN, J.

I concur in the dissenting opinion of Mr. Justice Sharpstein: McKee, J.

DEPARTMENT No. 2.

[Filed July 9, 1880.]

[No. 7085.]

FLETCHER, APPELLANT, vs. MOWER, RESPONDENT.

LAND PATENT. Inherent vices infecting patent of land from State are not sufficient to deprive grantee of his title, nor a good defense by purchaser in suit to recover purchase money.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

John D. Bicknell, for appellant.
J. W. Stump, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

In December, 1875, the plaintiff agreed in writing to convey to the defendant twenty acres of land for $1,000. De-

fendant paid $500 of the purchase price down, and executed a promissory note for the remaining $500, due eighteen months after its date; whereupon the defendant took possession of the land.

After the note became due the plaintiff brought suit on the note, tendered a deed according to agreement, and prayed for judgment against the defendant for the amount due on the note, and that the land be sold and the proceeds applied in satisfaction of such judgment, etc. Prayer in usual form.

Defendant, by his answer, admits all these facts, but denies that the plaintiff had, at the time of the execution of the agreement, or has now, the legal title to the lands, and alleges that there is an entire failure of consideration for the agreement of defendant and the $500 paid; alleges that the land was public land, subject to the general land laws of the United States, and that the defendant, being a qualified pre-emptor, entered and settled upon the south half of the northwest quarter and north half of southwest quarter of section 32, township 2 south, range 13 west, S. B. M., which includes the land in controversy, on the 12th day of March, 1876, claiming the same under the pre-emption laws of the United States; alleges the qualification of defendant as a pre-emptor; that he has tendered his filing, proof, and payment in the United States Land Office, etc.

Defendant also alleges that the land in controversy was, until 1871, within the claimed and exterior limits of a valid Mexican grant, and was not subject to selection by the State; that the title of plaintiff is by a patent from the State of California, which patent is alleged to be void.

Defendant also states that he tendered plaintiff the possession of the land, and offered to account for the rents and profits, and demanded a rescission of the contract; and upon these facts defendant prays that the title of plaintiff be adjudged void, and that plaintiff be enjoined from asserting any title to the land; that the agreement between plaintiff and defendant be rescinded, and that defendant recover judgment for the money paid plaintiff, etc.

Trial was had; judgment rendered for defendant as prayed for. Motion for a new trial was made and denied, and this appeal taken from the order denying the motion, and from the judgment.

The Court found, among other things, that the approved township plat including the land in question was filed in the United States Land Office April 22, 1868; that the land in

question was selected by the State Locating Agent as lieu land, and was listed to the State in November, 1871, and that a patent issued from the State to one E. W. Squires; and the defendant in his answer alleges that the plaintiff's claim of title is deraigned through mesne conveyance from said Squires. In other words, it is conceded that the plaintiff, before and at the time of the making of his contract to convey said land to the defendant, had succeeded to whatever right or title Squires had acquired by and through the patent issued to him by the State. The land is conceded to be agricultural land, and it is admitted that the defendant entered into possession under the agreement of the plaintiff to convey the land to the defendant.

This land is within a certain tract of land which was taken in lieu of the southeast quarter of section 36, township 4 south, range 4 west, San Bernardino Meridian; and the Court found "that at the time of making said application and selection," the land in lieu of which it was taken "was, and has been ever since, and is now in place, and is the property of the State of California, and has never been under the claim of any confirmed and finally surveyed Mexican or Spanish grant."

The decision of this cause must turn upon the question whether the plaintiff, when he tendered a conveyance of the land to the defendant, had a title thereto such as the parties contemplated at the time of entering into their contract that he should have and convey to the defendant. That he had a patent from the State is admitted; but it is insisted on behalf of defendant that, owing to certain inherent vices by which it is infected, it is voidable. We do not think that there can be any doubt as to the patent having vested in Squires and his grantors all the right, title, and interest of the State in and to the land described in it. The Act of March 27, 1872, vested any title which the State might have had before that time in him. The plaintiff tendered his deed to the defendant after the passage of what is known as the "Booth Bill;" and under the construction which has been given to that Act of Congress by both the Secretary of the Interior and the Attorney-General of the United States, the land in dispute was public land at the date of the selection by the State; and it was entirely competent for the United States, as between it and the State, to grant it to the State. We are entirely satisfied with that construction, from which it follows that the conclusions at which the Court below arrived are erroneous.

Judgment reversed, with direction to the Superior Court

of Los Angeles County to enter judgment upon the findings for the plaintiff as prayed for in his complaint.

I concur: Thornton, J.

CONCURRING OPINION.

I concur in the judgment, for the reason that the defendant does not show such a failure of consideration as will defeat plaintiff's right to recover. As to whether any title passed by the State patent, I express no opinion. MYRICK, J.

DEPARTMENT NO. 2.

[Filed June 22, 1880.]

[No. 6471.]

SAN FRANCISCO, APPELLANT,

vs.

SPRING VALLEY WATER WORKS, RESPONDENT.

ASSESSMENT OF CAPITAL STOCK OF CORPORATIONS. If the capital or capital stock of a corporation possesses value, it is assessable; and it is the duty of the Assessor to determine its value and assess it.

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

John P. Bell, for appellant.

Fox & Kellogg, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an action for the recovery of city and county taxes for the fiscal year 1876–7. The defendant demurred to the complaint on the following grounds:

"1. That the plaintiff hath not the legal capacity to sue or to maintain this action; for that the action, if maintainable at all, must be brought and prosecuted in the name of the people of the State of California, and not of this plaintiff.

"2. That several causes of action have been improperly united in said complaint, and in one count thereof—viz., a cause of action for an indebtedness alleged to be due to the city and county of San Francisco, and another cause of action for an indebtedness alleged to be due to the State of California.

"3. That said complaint does not state facts sufficient to constitute a cause of action."

This demurrer was sustained by the Court, the plaintiff declined to amend the complaint, and judgment was entered

for the defendant. From that judgment the plaintiff has appealed to this Court. It is conceded by the counsel for respondent that the form of the complaint is in accordance with the provisions of the statute under which the action is brought. (Statutes 1877-8, p. 338.) But they insist that the Act is unconstitutional. The objection that the Act embraces more than one object, and that two are expressed in its title, does not seem to us to be tenable. It has been decided in this State that the constitutional provision which declared that a law should embrace but one object, which should be expressed in the title, was merely directory. (*Washington* vs. *Page*, 4 Cal. 388; *Pierpont* vs. *Crouch*, 10 Cal. 315.)

But it is unnecessary for us at this time to express our approval or disapproval of those decisions, as we do not think that this Act embraces more than one object, or that more than one is expressed in its title. There can be no doubt, we think, of the intention of the Legislature to confer upon the plaintiff the authority to bring and maintain actions of this character. That intention might be more directly, but hardly more plainly, expressed than it is in the Act. Nor do we think that the Act is obnoxious to the objection that it does not have "a uniform operation." General laws must have. But this is not a general law. It is limited by its very terms to the municipal corporation of the city and county of San Francisco. With the general subject of taxation it does not attempt to deal. It simply attempts to provide for the collection of taxes—assessed, levied, and delinquent within a specified municipality. (*People* vs. *C. P. R. R.*, 43 Cal. 433.)

Upon the point which is most elaborately presented by the respondent, that the suit is brought to collect a tax alleged to be due upon an assessment of "capital," and that capital, unless it means "capital stock," is meaningless, and that "capital stock" is not taxable, we have only to remark that if it possesses value it is taxable, and it was the duty of the Assessor to ascertain whether it did; and he having determined that it did, we cannot on demurrer overrule his determination. The Court cannot, as a matter of law, decide that capital or capital stock is of no value, or that it does not belong to the corporation to which it is assessed. It was the duty of the Assessor to decide those questions. No law has been brought to our attention which forbids a corporation owning its capital or capital stock, or that declares that neither is of any value and not taxable. On the other hand, it has been held quite recently in New York that the capital stock of a corporation is the money or property put into the

corporate fund by the subscribers for said stock, which fund becomes the property of the corporation. (*Burrall* vs. *The B. R. R. Co.*, 75 N. Y. 211.)

The objection that it is not alleged in the complaint that the defendant's principal office or place of business is within the city and county of San Francisco, was not specifically raised by the demurrer; and if it had been, we are not prepared to hold that it could be sustained.

Judgment reversed, and cause remanded to the Superior Court of the city and county of San Francisco, with directions to overrule the demurrer to the complaint, with leave to the defendant to answer within the time usually allowed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed July 21, 1880.]

[No. 6728.]

ELLEN E. LOWELL, APPELLANT,

vs.

JOHN LOWELL, RESPONDENT.

APPEAL. The filing and service of notice of appeal is ineffectual until the undertaking is filed. The failure to file the undertaking within the time prescribed by the Code of Civil Procedure renders the notice nugatory; but if filed within that time, the appeal is well taken.

ATTORNEYS' FEES. A judgment in a divorce case requiring the defendant (husband) to pay plaintiff's attorney the sum of $100 for services rendered is not erroneous.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

A. C. Freeman, for appellant.

J. H. McKune, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

These are cross-appeals, the plaintiff appealing from the whole judgment, and the defendant from that portion thereof which decrees the defendant to pay the sum of $100 to A. C. Freeman, attorney for plaintiff, for services rendered.

Defendant's counsel moved to dismiss the appeal of plaintiff on the ground that the undertaking on appeal was not filed within one year after the judgment was entered.

An appeal is taken by filing and service of the notice, but

it is effectual for no purpose until the undertaking is filed. The failure to file the undertaking within the time prescribed by the Code of Civil Procedure renders the notice nugatory; but if filed within that time, the appeal is well taken. (*Peran* vs. *Monroe*, 1 Nev. 484; *McCreary* vs. *Everding*, No. 5046; see also *Holcomb* vs. *Sawyer*, in which case a rehearing was granted, and the question decided as herein, but the original opinion in which was reported by mistake, 51 Cal. 417.)

The action was brought by plaintiff to obtain a divorce from defendant, a partition of their homestead for alimony and for maintenance of her child, and to be let into possession of the homestead. Defendant, by way of cross-complaint, alleged desertion by plaintiff. The Court granted defendant a divorce from plaintiff, and decreed that the certificate of homestead be set aside and annulled, and that plaintiff have no interest in the homestead property.

1. The third denial of the answer is a denial of the material fact stated in the sixth allegation of plaintiff's complaint—to-wit, that the real estate described therein was the homestead of the parties.

2. It is urged that inasmuch as the same Court, on the 25th day of September, 1875, had decided that the plaintiff had not deserted defendant, finding *five* that plaintiff had deserted defendant June 6, 1873, *is not sustained by the evidence*. The desertion alleged in the cross-complaint is of February, 1877. The Court (finding sixth) finds that on that day plaintiff willfully deserted defendant, and has ever since willfully deserted and lived apart from him, and refused to cohabit, etc. If the facts recited in finding fifth can be held to be the equivalent of a finding that a desertion by plaintiff commenced in 1873, and such finding cannot be upheld for the reason mentioned by plaintiff's counsel, still the desertion, beginning in February, 1877, may be maintained, notwithstanding the prior adjudication. Giving the utmost effect to the prior judgment, it was a finding that the desertion had not continued for the statutory period when the former action was commenced.

3. The answer alleges that the real property described in the sixth allegation of plaintiff's complaint as a homestead, is the separate property of defendant. The decree properly provided for the preservation of the property to defendant.

The portion of the judgment directing the payment of money to plaintiff's attorney is not erroneous. (C. C. 137; C. C. P. 1049.)

Judgment affirmed.

We concur: McKee, J., Ross, J.

DEPARTMENT NO. 1.

[Filed July 21, 1880.]

[No. 6067.]

THE PEOPLE OF THE STATE OF CALIFORNIA, APPELLANTS.

VS.

ROBERT GARDNER ET AL., RESPONDENTS.

OFFICIAL BOND. A failure to obey the law or a disregard of duty is a non-performance of duty and a breach of the official bond of the officer, for which he and the sureties thereon are liable.

IDEM. When the same person acts in a double official capacity, evidence of acts committed in one official capacity is not admissible in a suit on official bond given for the other.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

Attorney-General, Joe Hamilton, and *P. Dunlap*, for appellants.

Edgerton, Tubbs & Cole, and *A. P. Callin*, for respondents.

McKEE, J., delivered the opinion of the Court:

Robert Gardner, one of the defendants in this case, was elected Surveyor-General of the State at the general election of 1874, and continued in office until the first Monday in December, 1875. Before entering upon the duties of his office he took the oath of office and gave bond with the other defendants as sureties in the sum of ten thousand dollars, conditioned as follows, to-wit: "Now, therefore, if the said Robert Gardner shall well and faithfully perform all the duties of his said office as required by law, and shall pay over all moneys that may come into his hands in the pursuance of the requirements of the statutes of said State, and shall faithfully execute and perform all the duties of such office required by any law to be enacted subsequent to the execution of this bond, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue."

For an alleged breach of this bond the action in hand was brought, and it is charged by the complaint in the action that during his term of office there were fees of office amounting in the aggregate to the sum of $75,845.43, which the defendant Gardner failed and neglected to collect and account for to the State; and that those fees of office which he did collect for the use and benefit of the State, amounting in all to

the sum of $76,620, he failed to disburse according to law for the benefit of the State, or to pay into the treasury of the State, but converted the same to his own use.

On the trial of the case, proof was made, by the "Application Books" in the Surveyor-General's office, that there had been filed during the term of office of defendant 7193 applications to purchase lands belonging to the State of California, the fees for filing 5798 of which were paid to the Surveyor-General, and that upon 1381 applications he had failed to collect the fees.

Evidence was also offered to show that contests were made before the Surveyor-General by opposing applicants for the purchase of State lands, and that he referred these contests to the District Courts by orders made and signed by him as Register of the State Land Office. About 200 of these orders were made in all. The greater number of them were made between December, 1871, and January, 1873, and the others between January, 1873, and December, 1875. Evidence was also offered to show that during his term of office the Surveyor-General had, as *ex officio* Register of the State Land Office, issued 7046 certificates of purchase of State lands, and upon final payment had prepared patents on the surrender of the certificates; and the amount of fees which had been paid to him therefor, and for listing lands to the State, and for other services rendered by him in his capacity as Register. The Court rejected the evidence, and when the plaintiff rested nonsuited the plaintiff, upon the ground that it had not been proved that the defendant Gardner, as Surveyor-General, had misappropriated any moneys collected by him in his office.

We think that the Court did not err in excluding the evidence of acts done by the defendant Gardner as Register of the State Land Office. Neither Gardner nor his sureties were liable upon the official bond of the Surveyor-General for malfeasance in the office of the Register, unless the acts of that office were part of the duties imposed upon the Surveyor-General, or were provided for by the bond given by him in his capacity as Surveyor-General. It was undoubtedly within the power of the Legislature to provide that duties required by law to be performed by the Register of the State Land Office should be performed by the Surveyor-General. If the Legislature had imposed these duties on the latter, he would have been bound to perform them; and for non-performance he and his sureties would have been liable; for they bound themselves for the faithful performance of all duties which may have been made the appro-

priate functions of the office, whether made such by laws enacted prior or subsequent to the execution of his official bond. Or if the Legislature had provided that the bond given by the Surveyor-General should include the duties required of the Surveyor-General and of the Register of the State Land Office, the sureties upon the bond of the former would be liable. But the Legislature made no such provision. When it created the two offices, it made them separate and distinct. (Act of March 28, 1868, Stat. of 1867–8, p. 507; Amended Act of 1870, p. 875.) The offices were so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace the obligations belonging to the other. (*People* vs. *Edwards*, 9 Cal. 286.) They were distinct as though filled by different persons. The duties and obligations of the one were entirely independent of the duties and obligations of the other. Before 1873 no bond was required for the performance of the duties of the office of Register. Upon the adoption of the Code the two offices were continued under the supervision and control of one officer; but the Surveyor-General, as *ex officio* Register, was required to give an additional bond to that which he gave as Surveyor-General. (Sec. 502, P. C.) For any malfeasance in the Register's office the sureties to his official bond are liable. The sureties to the bond of the Surveyor-General are liable only for the non-performance of such duties as have been imposed by law upon him which come within the scope of his office. But the law required him to discharge the duties relating to the public lands imposed upon him by Title VIII of Part III of the Political Code. (Sec. 483, P. C.) In the distribution of duties to the two offices in relation to the management and sale of lands belonging the State, the Legislature specially enjoined upon the Surveyor-General, as a duty appertaining to his office, to collect a fee of $5 from each applicant for land, and required him to make a report to the Governor of the State of the amount of fees received by him and the Register, and how the same were disposed of. Before the adoption of the Codes this duty was also required of him. (Sec. 55, Act of March 28, 1868, amended April 4, 1870; Stat. 1869–70, p. 876.) These fees were to be used in defraying the expense of procuring maps, records, documents, and extra assistance in the office of the Surveyor-General or of the Register, and the balance, if any, was to be paid into the State Treasury quarterly. (Stat. 1869–70, p. 876, Sec. 3574, P. C.) The collection of these fees was a plain duty appertaining to the office of the Surveyor-General.

It is the duty of an officer to do what the law requires to be done in his office; for the law is to him a command which he must obey. If it prescribes the course which shall be taken, and the thing which must be done by any one in office, the officer cannot disregard it. A failure to obey the law, or a disregard of duty, is a non-performance of duty and a breach of the official bond of the officer, for which he and the sureties thereon are liable. When therefore the plaintiff had proved that the defendant Gardner, during his term of office, had failed to collect the fees on 1381 applications to purchase land belonging to the State, and to account for the same as required by law, that proof should have been considered by the Court, and the Court erred in granting a nonsuit.

Order denying motion for a new trial reversed, and cause remanded.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed July 19, 1880.]

[No. 6356.]

F. E. CROWLEY, RESPONDENT,

vs.

THE GENESEE VALLEY MINING COMPANY, APPELLANT.

CONTRACTS OF CORPORATIONS. It is not necessary that a contract made by a corporation should be under its seal. Nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts.

Appeal from the District Court of the Twenty-first Judicial District, Plumas County.

W. W. Kellogg and *R. H. F. Variel*, for respondent.
J. C. Chapman and *J. D. Goodwin*, for appellant.

McKEE, J., delivered the opinion of the Court:

On the trial of this case in the Court below, it was admitted that one M. J. Quin was the president of the corporation defendant in this case, and the superintendent and managing agent of its mines in Plumas County; had had full control

of its business in that county, its principal place of business being in the city of San Francisco. It was proved that he was the principal stockholder in the company. On the 11th of September, 1877, Quin employed the plaintiff to work in a quartz mine in Plumas County belonging to the defendant, for the purpose of taking out what is known as "tribute rock," and delivering it at the defendant's quartz mine to be crushed by the company at its mill, free of costs or expenses to the plaintiff; and as compensation for his services, one-half of the gross amount of the proceeds of each crushing was to be paid to the plaintiff. On the 12th of September, 1877, the plaintiff went to work, under this agreement, at taking out rock from the mine, and continued to work for the defendant until January, 1878, when he was discharged by Quin.

Two crushings were made by the defendant of rock taken out and delivered by the plaintiff—one on the 25th of October, 1877, and the other on the 7th of February, 1878. Of the proceeds of the first crushing the plaintiff was paid according to the terms of the agreement. From the last crushing there was realized fifty and two-eighths ounces of gold dust, which was sent to the San Francisco mint for coinage; and after paying all expenses and mint charges, there was due to the plaintiff over $400, which the defendant failed or refused to pay to the plaintiff, and hence this suit.

It was objected by the corporation that the agreement which was made with the plaintiff by its president, superintendent, and managing agent is not a contract, but a lease; but the agreement is a contract of employment, under Section 1965 of the Civil Code, and it is binding on the defendant if Quin had authority to make it. Plaintiff does not rely upon the existence of an authority of record. He did not claim or prove that the board of directors of the defendant had, by resolution or order, authorized Quin to make such a contract, or that the latter had ever informed the directors that he had made it. He himself claimed that Quin had authority, from the admitted relations existing between him and the defendant.

Upon this theory the case was tried in the Court below; and when the defendant offered to prove by Quin that the board of directors never authorized him to make such a contract with the plaintiff, or any one else, and that he had never informed the board of the execution or existence of the contract, and that the directors knew nothing of it, the Court sustained an objection to the offer, and afterward re-

fused to give the following instruction to the jury: "Neither the president, superintendent, nor the managing agent of the corporation can, by virtue of their said offices, execute such a contract binding the corporation." And while the Court gave the following instruction to the jury, which was asked by the defendant—viz., "If you believe from the evidence that the said Quin, as the managing agent or the superintendent of the defendant, entered into the contract charged in plaintiff's complaint, before you can hold this defendant liable for a breach of said contract you must further find that either the board of directors authorized said Quin to make such contract, or that, after being informed of the nature of said contract, the board of directors ratified the same"—yet it accompanied the instruction with the following modification—viz., "But the fact that such authority was given to the superintendent may be inferred from his admitted relations to the corporation defendant."

The question therefore arises, whether the appointment of an agent for a corporation to make a contract for work and labor or services upon the property of the corporation must be made under seal or by resolution, or whether it can be inferred from the admitted relations of the agent to the corporation, or from the course of business of the corporation itself.

The common law rule that a corporation has no capacity to act or to make a contract, except under its common seal, has been long since exploded in this country. Even in England it has been found to be impracticable, so that the classes of cases which constitute exceptions to the rule have become so numerous that the exceptions have almost abrogated the rule. In the United States, nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts. "If this were not so," says Mr. Chief Justice Redfield, "it would lead to very great injustice; for it is notorious that the transactions of the ordinary business of railways, banks, and similar corporations in this country is without any formal meetings or votes of the board; hence there follows a necessity of giving effect to the acts of such corporations according to the mode in which they choose to allow them to be transacted. If this were not done, it would become impossible to dispose of such contracts with any hope of reaching the truth and justice of the rights and duties of the several parties involved. * * * This is merely holding corpora-

tions to such rules of action as they see fit to adopt for their own guidance and the transaction of their business." (*Bank of Middlebury* vs. *Rutland R. R. Co.*, 30 Vermont, 159.)

When therefore the defendant admitted on the trial of the case in hand that Quin was its president and superintendent and general managing agent, this was sufficient evidence of his authority to make the contract with the plaintiff; and it was not necessary for the plaintiff to show any vote or other corporate act constituting him the agent of the corporation. It would not be in accordance with justice or the interests of society to allow corporations to deny the authority of such agents, or to repudiate contracts made by them for work and labor from which they derive benefit. So in *Goodwin* vs. *The Union Screw Company*, where it appeared that the business of manufacturing screws was conducted under the general management of one of its directors, who made a verbal contract with the plaintiff to work in the shop at manufacturing screws for the defendant, the Supreme Court of New Hampshire held that where one has the actual charge and management of the general business of a corporation, with the knowledge of the members or the directors, this is sufficient evidence of authority; and the company will be bound by his contracts made on their behalf within the apparent scope of the business intrusted to him. (34 N. H. 378.) And in *Boynton* vs. *The Wilson Sewing Machine Company*, where it appeared that an architect had drawn plans for a building for a corporation, under a verbal contract made with one who was acting as president, executive manager, and principal stockholder of the company, the Supreme Court of Illinois held that the contract was binding upon the corporation. "A corporation," says the Court, "which suffers appearances to exist, and its officers and agents to so act as to give one employed by such officers and agents reason to believe that he is employed by the company, becomes liable to such person as his employee to pay for the services rendered." (73 Illinois Rep. 608. See also 29 Ala. 221; 7 Cranch, 309; 8 Wheat. 338; 12 *Id.* 64.)

Hence the Court below did not err in rejecting the evidence which was offered by the defendant, or in overruling the defendant's motion for a nonsuit, or in refusing to give to the jury the instructions which the defendant requested, or in modifying those which were given at the defendant's request.

Order affirmed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed June 22, 1880.]

[No. 6352.]

MEIGS ET AL., APPELLANTS,

vs.

BRUNTSCH ET AL., RESPONDENTS.

CONTRACTS—EXTRA WORK. Where a contract to build provides that no extra work shall be paid for unless the price has been fixed by the parties, the work named and the agreement made at the time the extra work is done, it is error to enter judgment for extra work when it is found that no agreement had been made, no price fixed for extra work, either before or after the extra work had been done.

Appeal from the District Court of the Twelfth Judicial District, San Francisco County.

H. C. Firebaugh, for appellants.

Pringle & Hayne, for respondents.

MYRICK, J., delivered the opinion of the Court:

This is an action to enforce liens in favor of plaintiffs for materials furnished by them in and about the construction of a house by defendant Roettger for defendant Bruntsch under a contract. The total amount of the liens claimed is $457.95, and plaintiffs also ask judgment for $200 attorney's fees, and $52 expenses of the liens. Plaintiffs had judgment for $25.95, without costs or attorneys' fees; plaintiffs moved for a new trial, which was denied, and they appealed.

After examining the transcript, we find that the contract price for erecting the building was $1,515; that $1,000 was paid as the work progressed; that the last payment, $515, was not made, because Bruntsch claimed that the building was not completed "in a good, workmanlike, and substantial manner," as the contract required it should have been; that the $29.95, for which judgment was rendered, was for extra work; that the substantial question submitted to the Court below was whether the contract had been complied with on the part of Roettger, upon which the evidence was conflicting; that the Court found that "Roettger never did construct or finish said building in a good and workmanlike or substantial manner; but, on the contrary, erected and constructed the same in a careless, unskillful, and unworkmanlike manner." We see no error in this.

The contract provides, "no extra work to be paid for unless the price has been fixed by the parties, the work named, and the agreement made at the time the extra work is done." The finding is, "that no price was fixed nor agree-

ment made by the parties at the time said extra work was done, either before or afterwards." Upon this finding plaintiff was not entitled, in this action, to any judgment for extra work.

The judgment is reversed, and the cause is remanded to the Superior Court of the city and county of San Francisco, with instructions to render judgment for defendants, Bruntsch and the German Savings and Loan Society, and for their costs.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT NO. 1.

[Filed July 6, 1880.]

[No. 7150.]

S. WILSON, APPELLANT, VS. HIS CREDITORS, RESPONDENTS.

INSOLVENCY—RETURN DAY.

Appeal from the District Court of the Eighteenth Judicial District, San Bernardino County.

H. M. Aberry, for appellant.

John S. Harrington, for respondents.

MCKINSTRY J., delivered the opinion of the Court:

Plaintiff filed his petition in insolvency in the County Court of Colusa County. The Court made an order that the creditors show cause, etc. The Clerk issued the proper notice to the creditors to appear on the first day of December, 1879, and the first publication was made November 1, 1879.

The language of the statute is: "The Judge granting an order for a meeting of the creditors shall direct the Clerk of the Court to issue a notice, calling the creditors of the insolvent to be and appear upon a specified day, not less than thirty * * * days from the first publication of such notice," etc. (Acts of 1852, p. 69.)

The statute does not require that the creditors shall have full thirty days *from* (and after) the day of the final publication, but that they shall appear *on a day*, which day shall not be less than thirty days from the day of the first publication. The return day here was not less than thirty, but just thirty days from the first publication.

Order reversed, and the Court below directed to enter such order for the distribution of the moneys in the hands of the assignee as may be proper.

We concur: McKee, J., Ross, J.

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Current Topics.

"ATTORNEY-GENERAL WARD," says the *Albany Law Journal*, "is of opinion that telegraph poles are to be assessed as real estate." He says: "These structures are articles erected upon and affixed to the land, so as to create an interest therein, and are, to the extent of the value thereof, *land* of the telegraph company erecting them, and, as such, liable to taxation; and it is the duty of the assessors to assess the same as land, to the value thereof." He cites *People* vs. *Cassity*, 46 N. Y. 46, which declares that "lands" includes such an interest in real estate as will protect the erection or affixing and possession of buildings and *fixtures* thereon, though unaccompanied by the fee. Also 74 N. Y. 365, and 52 Barb. 105. In 19 Hunter, 460, it was decided that—"Foundations for piers or columns placed in a public street by an elevated railroad, whether standing alone or with columns, and the superstructure thereon, are properly taxable as real estate."

Supreme Court of California.

IN BANK.

[Filed March 23, 1880.]

[No. 6905.]

HYATT, PETITIONER, vs. ALLEN, RESPONDENT.

JURISDICTION OF SUPREME COURT IN MANDAMUS. This Court has power, under the Constitution of this State, to grant writ of mandate in an original application.

PARTIES TO APPLICATION FOR MANDAMUS. A taxpayer within the district of which the respondent is Assessor is "a party beneficially interested" in having all the taxable property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of the writ of mandamus.

WHAT IS A SUFFICIENT ALLEGATION OF DEMAND. The allegation of a request made the Assessor to perform his duty in making his assessment and his refusal to comply therewith is sufficient, without stating the character of the demand.

CONSTITUTION. Self-executing provision of Constitution considered.

MANDAMUS. Mandamus is the proper remedy to compel Assessor to do his duty.

Petition for writ of *mandamus*.

J. H. Budd and *S. L. Carter*, for petitioner.
Pillsbury and *Campbell*, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

An application has been made to this Court for a writ of *mandamus* to issue to the Assessor of the City of Stockton.

There is no cause pending in this Court on appeal, in which it is necessary or proper to issue the writ prayed for to that officer. The application is therefore in the nature of an original one to this Court, and for that reason it is insisted, on behalf of the respondent, that this Court has no power under the Constitution of this State to grant it. Consequently it devolves upon this Court to determine that question. This we will proceed to do before considering any other question involved in the case.

This Court derives its jurisdiction from Section 4 of Article VI of the Constitution. The jurisdiction which the Constitution confers upon the Court it is bound to exercise; and it is equally bound not to exercise any other. It is no less the plain and solemn duty of the Court to act in the one case than it is to refrain from acting in the other. Neither

usurpation nor dereliction in respect of jurisdiction can be safely tolerated in courts of justice. Both should be avoided in all cases.

The section of the Constitution to which we have referred prescribes, first, the appellate jurisdiction of this Court with a precision which leaves nothing further to be desired in that respect. Following that is this clause: "The Court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction."

The history of this clause is as follows: In the first Constitution there was a provision which read: "And the said Court, and each of the Justices thereof, shall have power to issue writs of *habeas corpus* at the instance of any person held in actual custody. They shall also have power to issue all other writs and process necessary to the exercise of their appellate jurisdiction." That clause received an early construction in the *People* vs. *Turner*, 1 Cal. 144, in which it was said: "That with the single exception of proceedings upon *habeas corpus*, this Court has no original jurisdiction, and that the Legislature can confer upon it none." This was afterwards cited and approved in *White* vs. *Lighthall*, 1 Cal. 347, and in *Cowell* vs. *Buckelew*, 14 Cal. 642.

The second Constitution contained the following clause: "The Court shall also have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." This likewise came early before the Court for construction; and in *Tyler* vs. *Houghton*, 25 Cal. 26, the Court, Sanderson, C. J., delivering the opinion, after comparing this with the clause above cited from the first Constitution, says: "It is clear that under the old Constitution this Court had no original jurisdiction, except in cases of *habeas corpus*. The only change made by the new Constitution is the addition of the writs of *mandamus*, *certiorari*, and prohibition. These writs could be issued in aid of the appellate jurisdiction of the Court previous to the amendments to the Constitution, under the general powers conferred to issue all writs necessary to the exercise of its appellate jurisdiction. Therefore there could have been no occasion to enumerate these writs for the purpose of enlarging the appellate powers of the Court. And we think, although it might have been more clearly expressed, that such intention is apparent from the language used. The clause in question must be read as giving express power to issue the writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and, *in addition*

thereto, all writs necessary or propor to the complete exercise of its appellate jurisdiction. By this reading only can any design be accorded to the change which has been made." This was accepted and acquiesced in as the true construction of the clause of the late Constitution relating to the power of this Court to issue the writs referred to, until that Constitution was superseded by the present one.

In view of the long acquiescence in that construction, it will be conceded on all sides that if the clause, in the late Constitution relating to this subject, had been literally copied into the present Constitution, it would have been conclusive evidence of the intention of those who framed and of those who adopted the latter instrument to confer the same powers upon the present Court that the late Constitution, according to that decision, conferred upon the late Court. Of this there can be no doubt. There is, however, a difference at least in the phraseology employed in the clauses relating to this subject in the late and present Constitution. If it be a substantial difference, it must be held to indicate an intention to change the organic law on this subject.

If, on the other hand, there has been no substantial change effected in the meaning of the two clauses, the mere change in the phraseology will not be deemed to alter the law. The rule was laid down by Chief Justice Kent and Mr. Justice Spencer as follows: "Where a law, antecedently to a revision of the statute, is settled, either by clear expressions in the statutes or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention to work a change." (*Taylor* vs. *Delaney*, 2 Caines' Cases in Error, 150; *Yate's* case, 4 Johns. 359.) This statement of the rule has been cited and approved by nearly all the eminent jurists of New York, and by many of the highest courts of other States. In *Duramos* vs. *Harrison*, 26 Ala. 326, the Court says: "We must take it for granted that at the time the Code was adopted, the Legislature knew the construction which had been placed on the former statutes, above referred to, by the several decisions above cited. And if, with this knowledge, the Legislature has re-enacted in the Code provisions which are *substantially* the same as those contained in the former statutes, such re-enactment is a legislative adoption of the known construction of those provisions." As is well known to the profession, at least, the general rules of interpretation are the same, whether applied to statutes or constitutions. (Sedgw. on the Construction of Stat. and Const. Law, 19.)

The difference between the clause in the late, and the corresponding one of the present Constitution, consists in the omission in the present Constitution of the word "also" which occurred in the late, and of the introduction of the word "other" into the present, which did not occur in the corresponding sentence of the late Constitution. In the late Constitution the sentence read: "And *also* all writs;" in the present it reads, "and all *other* writs." The omission of the word "also" is of little or no significance. The expression "and also" is tautological, although of frequent occurrence in legal instruments. The introduction of the word "other" is not so easily accounted for. Its meaning is not the same as that of "also," and yet its introduction does not necessarily indicate an intention to change the meaning of the clause into which it was introduced. Before arriving at that conclusion we must determine, if we can, what the word "other" does mean in the connection in which it is used. Webster's definition of it is, "different from that which has been specified." Worcester's, "not the same; not this or these; different."

We are bound by a familiar rule of construction not to treat any word as redundant if we can avoid doing so without marring the obvious sense of the entire clause. In order to express the full meaning and significance of that word in the connection in which it is used in the clause under consideration, that clause must be reconstructed as follows: "The Court shall have power to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*, and all writs *different from those which have been specified*, necessary or proper, for the complete exercise of its appellate jurisdiction."

The objection to this construction is, that it deprives the Court of the power to issue, in the strict exercise of its appellate jurisdiction, any of the enumerated writs. But the objection, in our opinion, is untenable. If the power of the Court to issue the enumerated writs, when necessary for the complete exercise of its appellate jurisdiction, depended upon a direct and positive grant of that power in the Constitution, the force of the objection would be apparent. In the absence, however, of any specific prohibition in the Constitution, the Court would undoubtedly have the power to issue all writs necessary to the complete exercise of its appellate jurisdiction." And the clause under consideration, as we construe it, does not affect the power of the Court in that respect. Its effect is to limit the power of the Court to issue the non-enumerated writs to cases in which it is necessary to the complete exercise of its appellate jurisdiction to issue

them, and to enable the Court to issue the enumerated writs in all cases for which no other appropriate or adequate remedy has been provided.

Conceding, however, that the objection is well founded, it affords no warrant for our violating a rule of construction, which requires that a limiting clause shall be restrained to the last preceding antecedent, and that a subsequent obscure clause shall not control a previous clear provision. (*Cushing* vs. *Warrick*, 9 Gray, 382; *State* vs. *Williams*, 9 Ind. 191.) But for the subsequent clause, which clearly relates to the appellate jurisdiction, the preceding clause would be free of ambiguity; and in order to import one into it we must disregard the maxim, "*Ad proximum antecedens fiat relatio, nisi impediatur sententia.*"

The clear provision is that the Court shall have power to issue the writs enumerated. The obscure one is that it shall have power to issue all other writs necessary or proper to the complete exercise of its appellate jurisdiction. The question is whether the Court, in the exercise of its appellate jurisdiction, may not issue any of the enumerated writs when it becomes necessary or proper so to do. But that question does not arise in this case, and it will not be necessary to consider it until, in the exercise of its appellate jurisdiction, it becomes necessary or proper for the Court to issue one of the enumerated writs. It may be remarked, however, that the applications for these writs are generally in cases not pending in this Court on appeal, and that they are seldom issued in the strict exercise of its appellate jurisdiction. This, as a matter of practice, must have been known to the framers of the Constitution; and for that reason we have no right to presume that if it had been their intention to effect the radical change for which some contend, they would not have made it clearly manifest. If the intention had been to limit the power to issue any of these writs to cases strictly within the appellate jurisdiction of the Court, then, as we have already suggested, the entire provision is redundant; and it is our duty to so construe every provision of a written instrument as to give force and effect, not only to every clause, but to every word in it, so that no clause or word may become redundant, unless such construction would be obviously repugnant to the intention of the framers of the instrument, to be collected from its terms, or would lead to some other inconvenience or absurdity.

A comparison between the provisions of the present and those of the first Constitution adopted in 1849 on this subject strengthens, we think, our position on this question. In

the latter, only one writ was specified—the writ of *habeas corpus;* and after conferring power upon the Court to issue that writ, the following clause occurs: "They shall also have power to issue all *other* writs and process necessary to the exercise of their appellate jurisdiction." In the *People* vs. *Turner, supra,* the Court, in construing this clause, says: "It appears entirely clear that, with a single exception of proceedings upon writs of *habeas corpus*, this Court has no original jurisdiction."

If in that Constitution, as in the present, any other writs had been specifically enumerated in connection with the writ of *habeas corpus*, there is no reason for thinking that the Court would not have included them in the exception. In the latter clause of the provision of the Constitution of 1849, to which we have referred, the phrase "*other writs* and process necessary to the exercise of their appellate jurisdiction" occurs; and it has never been suggested, so far as we are advised, that that restricted the issuance of the writ of *habeas corpus* by the Court to cases within its appellate jurisdiction.

It is perhaps worthy of remark that in no one of the three Constitutions of this State is the jurisdiction of this Court in any case termed "original." While it has never been doubted that this Court might, under any of these Constitutions, issue the writ of *habeas corpus* in cases outside of its appellate jurisdiction, the exercise of that power is not denominated as "original jurisdiction" in any one of the three. This convinces us that when providing for the issuance of the writs enumerated in the clauses which we have had under consideration, the framers of these Constitutions intended that they should be issued when necessary, without reference to the questions of original or appellate jurisdiction. The non-enumerated writs could only be issued in the exercise of the appellate jurisdiction of the Court. The distinction between the writs enumerated and those not enumerated exists in all three of the Constitutions, although in the first there is but one writ specifically mentioned.

The conclusion at which we have arrived upon the question of the jurisdiction of the Court to issue the writ, makes it necessary for us to examine and pass upon the other grounds specified in the demurrer to the petition. These are four in number, and are to the effect that the petition does not state facts sufficient to justify the issuance of the writ; that the petitioner has not the legal capacity to sue out the writ; that the petition is ambiguous and uncertain, because it does not state the value of the property which, it is alleged, the Assessor refuses to assess; and that it does not

appear that any demand was made upon the Assessor to assess the property mentioned in the petition.

In a brief filed on the part of the respondent there are no points or authorities stated or cited upon any question involved in the case, except as to the constitutional power of the Court to issue the writ, which we have already passed upon.

We think that the petitioner, who is a taxpayer within the district of which the respondent is Assessor, is "a party beneficially interested" in having all the taxable property in the district assessed, and is therefore a proper party to make the affidavit for the issuance of the writ in this case.

The objection that the petition does not state the *character* of the demand made upon the Assessor to perform his duty, does not, in the absence of any point or authority to support it, impress itself upon us as possessing any merit. We deem the allegation of a request and refusal sufficient.

That *mandamus* is the appropriate remedy in cases like this is settled by *People* vs. *Shearer*, 30 Cal. 645.

The rule that the provisions of State Constitutions which do not require subsequent legislation to enforce them are self-executing, was considered in *McDonald* vs. *Patterson*, No. 6989, recently decided; and we think that Section 1 of Article XIII, which provides that "all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, *to be ascertained as provided by law*," requires that Assessors shall proceed to ascertain such value *in the manner* now provided by law. Or, in other words, that the law in force at the time of making an assessment must be their guide as to the manner of ascertaining values, and that the provisions of the Political Code, so far as they relate to the manner in which the value of property must be ascertained, is not in conflict with the provisions of the Constitution, and therefore in force at the present time.

Ordered that a writ of *mandamus* issue to the respondent, E. H. Allen, Assessor of the city of Stockton, in the county of San Joaquin, State of California, requiring and commanding him to assess in the manner now provided by law, all property in said city, which it is declared in Article XIII of Section 1 of the Constitution of this State shall be taxed in proportion to its value.

We concur: Morrison, C. J., Ross, J., Myrick, J., McKinstry, J.

(Mr. Justice McKee, not having heard the argument in this case, did not participate in the decision.)

DISSENTING OPINION.

In this case I respectfully dissent from the opinion of the other Judges of this Court as to the power vested in this tribunal by the Constitution of 1879, in relation to the writ of *mandamus*. The question to be considered may be stated as follows: Has this Court original jurisdiction in causes commenced in it by a writ of *mandamus?* This must be determined by the Constitution adopted in 1879.

The jurisdiction of this Court is given and defined in Article VI of the Constitution. Section 4 of that article is in these words:

"The Supreme Court shall have appellate jurisdiction in all cases in equity, except such as arise in Justices' Courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also in all criminal cases prosecuted by indictment or information in a Court of Record on questions of law alone. The Court shall also have power to issue writs of *mandamus, certiorari,* prohibition, and *habeas corpus,* and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the Justices shall have power to issue writs of *habeas corpus* to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself, or the Supreme Court, or before any Superior Court in the State, or before any Judge thereof."

It is obvious from the most careless perusal of this section that it was intended by it to confer appellate jurisdiction upon the Supreme Court. The words "original jurisdiction" nowhere appear in it. And if original jurisdiction is at all given it as to the writ referred to, it must be by implication from the words quoted above, which are used in conferring jurisdiction on this tribunal.

The appellate jurisdiction given is broad and ample, much more so than was conferred by the two previous Constitutions of this State. This will be obvious from an inspection of the clauses by which such jurisdiction was and is conferred. Following the clause conferring this enlarged appellate jurisdiction are these words: "The Court shall also have power to issue writs of *mandamus, certiorari, prohibition,*

and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction."

The collocation of this clause is suggestive. It follows the grant of a defined jurisdiction, and points directly to that jurisdiction. Power is given the Court to issue certain writs, "and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." This juxtaposition of the clauses referred to indicate an intention to confer the power given by the last clause cited for the purpose of aiding, strengthening, maintaining, and rendering effective its appellate jurisdiction. In other words, the grant of power is equivalent to this: that after having created the Judicial Department as an independent one, and conferring upon it full powers as a Court of Appeal, a further grant of power is made to it, to issue the writs referred to, to maintain and conserve this independence, that in case the Legislature should refuse to provide the necessary machinery to carry out this jurisdiction in the matter of appeals, this Court should be armed with all the writs referred to, and power to issue them to render the appellate jurisdiction effectual. The framers of the Constitution did not intend to leave the subject matter of appeals to the Legislature alone, but so to confer it on this Court that it might render the right of appeal effective, though the Legislature should fail to enact the requisite legislation, or should go so far as to attempt to clog or impede or take away the right.

It is no answer to say that the Legislature has never at any former period of the history of the State refused to legislate on this subject. This may be admitted. Yet this fact, though persuasive to the conclusion that such a thing will never occur, is no guarantee that it may not; and the framers of the Constitution, and the people in ratifying it, intended to provide for an emergency which, though not probable, was yet possible. We know that unfortunate dissensions have arisen between co-ordinate departments of governments, and may arise again. Though all the unfortunate consequences which may result from such dissension or from conflict may not be foreseen and provided against, still this was foreseen, and it was wise to provide against it.

It is hardly necessary to say that all the writs mentioned may be and have been used by Appellate Courts for the exercise of their jurisdiction. Instances of this exercise often occur and are frequently met with in the reports of causes. The writ of *habeas corpus* was used in this way in *Ex parte Simonton*, 9 Porter Alabama, 383; and the same writ, together with the writ of *certiorari*, was held to be proper to

bring up the decision appealed from in *Ex parte Croom* and *May*, 19 Alabama, 561. The Supreme Court of the United States issued the writ of *habeas corpus* in the exercise of its appellate jurisdiction. (*Ex parte Hamilton*, 3 Dall. 17; *Ex parte Bollman et al.*, 4 Cranch, 75; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 7 Peters, 568; *Ex parte Milburn*, 9 Peters, 704; *Matter of Metzger*, 5 How. 176; *Matter of Kaine*, 14 How. 103). So also the writ of mandamus. (See *Marbury* vs. *Madison*, 1 Cranch, 137; *Cowell* vs. *Buckelew*, 14 Cal. 640; High's Extra Remedies, Sec. 581, and cases cited in notes to that section.) That courts have found such writs and other writs necessary to the proper and complete exercise of their appellate jurisdiction is persuasive to show that in the minds of the framers of the Constitution such a grant was necessary and proper to make the jurisdiction effectual, and that the power was given for that purpose.

The construction of the Constitution is to be made upon an examination of the whole instrument, so that effect is to be given, if possible, to the entire instrument and every section and clause. In comparing the sections and clauses, it is not to be suposed that any words have been used without occasion, or without intent that they shall have effect as a part of the organic law. Courts must lean in favor of a construction which will make every word operative, rather than one which may make some idle and nugatory. (Cooley's Const. Lim., pp. 57–58.)

In this clause, then, every word demands attention. Not one should be overlooked or disregarded.

Section 5 of the article referred to defines the jurisdiction of the Superior Court. That jurisdiction is declared to be *original*, and it is made to embrace the writs mentioned in Section 4. The language used conferring jurisdiction, "shall have power to issue," is the same as that used in Section 4; and the same power is given by the same words to the Judges of the Superior Courts. The intention is manifest that the jurisdiction is given as a part of the original jurisdiction of the Courts mentioned in the section. It is not declared to be given in aid of their original jurisdiction. It follows that it is a part of it. In Section 4 the power is conferred in aid of the jurisdiction before given. The only jurisdiction spoken of and embraced in words in the section is *appellate*. And then the words conferring the power as to the writs mentioned follow immediately: "The Court shall also have power to issue writs of mandamus, *certiorari*, prohibition, and *habeas corpus*, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction."

The casting of the clauses referred to in the same mould justifies the inference that the power was given in reference to the jurisdiction conferred in the prior part of the respective sections. As to the Supreme Court in relation to its appellate, and as to the Superior Court as a part of its original jurisdiction.

Effect is to be given to every word in the clause. The interpretation which would construe the clause in the fourth section as conferring original jurisdiction leaves out of view the word *other*, or misinterprets its meaning.

The word "other" is a pronominal adjective, or adjective pronoun—that is to say, it is a word used instead of a name or noun. It is employed here to obviate the insertion of a long list of writs known to the law, and it may be of such writs as may be framed by the Court to carry out and effectuate its expressed jurisdiction. Instead of inserting such writs as *eo nomine*, they are embraced in the expression "all other writs." These words constitute an ellipsis to save the employment of other words, which were thus rendered unnecessary. The clause should be read as if the writs were inserted *eo nomine*, to get at its real meaning. Instead of all other writs, insert the name of the writs, and thus its significance is made apparent.

The Court shall have power to issue all writs (naming them) "necessary or proper to the complete exercise of its appellate jurisdiction." The word "other" thus is given effect to.

The other construction contended for is, that there are two separate and distinct grants of power in this clause. The contentention is this: (1) The Court shall have power to issue writs of mandamus, *certiorari*, prohibition, and *habeas corpus*, as a grant of original jurisdiction; and (2) that the Court shall have power to issue all other writs necessary or proper to the complete exercise of its appellate jurisdiction.

In my opinion such a construction cannot be maintained. If it can, it confines the power of this Court to issue writs necessary or proper to the complete exercise of its jurisdiction on appeals to *other* writs than those mentioned *by name* in the clause; for the grant there is of *other writs* than those specially enumerated. Such a construction cripples the Court in its most important functions, which are appellate, and allows the issuance of these writs for a purpose for which they are to a great degree, if not wholly, unnecessary, since the whole power contended to be vested in this Court as original can be exercised by it as fully and effectively on appeal, in the class of cases referred to, from the judgments of the Superior Courts.

But it is said that one Superior Court cannot send its mandate to another Court of the same class. This may be granted, and still it makes nothing for the argument. A sufficient answer to this is, that it was not intended by the framers of the Constitution, and the people who adopted it, that there should be in any tribunal a power in the nature of original jurisdiction to send any such writs to a Superior Court, since the jurisdiction on appeal was all sufficient.

It may be further contended that it may be necessary to send a writ of the kind mentioned to a Superior Judge to compel him to try a cause. It does not appear that it was in the minds of those who framed or adopted the Constitution that a writ would ever be necessary for any such purpose. It may well have been concluded that the learned gentlemen who would fill the position of Judges of such courts would require no such mandate or admonition to enforce the discharge of their duty to try a cause brought before them; or if they did, that the compulsion to its discharge might well be left to be enforced by another tribunal, or by the judgment of those who constituted them their servants for the exercise of the high function conferred upon them.

Another answer to this position is this: That it can scarcely occur that the appellate jurisdiction, in its broad sense, will not be amply sufficient to correct any such dereliction on the part of a Judge of the Superior Court. But it is said the grammatical arrangement of the clause referred to shows a grant of original jurisdiction. The rule on this subject is correctly stated by Johnson, J., in *Newell* vs. *People*, 7 N. Y. 9–97, in these words:

"Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing which we are to seek is *the thought which it expresses*. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order of grammatical arrangement in which the framers of the instrument have placed them. If thus regarded the words embody a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither courts nor legislatures have a right to add to or take away from that meaning."

Is not the grammatical arrangement in accordance with the

view above indicated, that no original jurisdiction is granted by the words of the clause?

The portions of the clause referred to are connected by the conjunction "and." Webster says of it: "A particle which expresses the relation of addition. It may connect words merely; as, three *and* four are seven: or full sentences; as, the sun shines, *and* the air is mild." (Webster's Dict., word "and," see edition of 1876.)

There is nothing here inconsistent with the view urged; on the contrary, it sustains it. Whether viewed as a particle expressing the relation of addition, or as a mere connecting word of sentences or portions of a sentence, the conclusion is the same. "*All other writs*" are additions to those going before, or the two sentences are connected, and when so connected have reference to the same end or purpose—that is, "the complete exercise of appellate jurisdiction."

In fact there is only one sentence. The reading of the whole clause together shows this. If there are two sentences, the words "necessary or proper to the complete exercise of its appellate jurisdiction" must be cut off entirely from the words "the Court shall have power to issue writs of *mandamus, certiorari*, prohibition, and *habeas corpus*;" and it must be held that the former words have no relation to the latter. Can it be held that this was the thought intended to be expressed in the clause? If such is the interpretation, then the conclusion cannot be resisted that the words "all other writs" exclude the writs referred to and named in the prior words of the clause. Such an interpretation will scarcely be contended for.

The repetition of the conjunction "and" before and after "*habeas corpus*" in the clause, can hardly be sufficient to set aside the conclusion above referred to. In common speech "and" is frequently so used, and is often found so employed by the best writers.

The word "and" is employed to connect several antecedents of relative words. It is so used here, where the writs named "and all *other writs*" seem to be equally antecedent to the words to which they relate, "necessary or proper to the complete exercise," etc. It is true that, in strict grammatical construction, relative words refer to the last antecedent. But this is not so where the intent upon the whole instrument or context shows to the contrary. (See maxim "*Ad proximum antecedens*," etc.; Broom's Legal Maxims, p. 652, and cases referred to; *Ex parte Bollman*, 4 Cranch, 94 and 95, per Marshall, C. J.)

Broom says: "There are numerous examples in the best

writers to show that the context may often require a deviation from this rule, and that the relative may be connected with nouns which go before the last antecedent, and which either take from it or give to it some qualification"—referring to *Staniland* vs. *Hopkins*, 9 M. and W. 192; *R.* vs. *St. Mary's Leicester*, 1 B. and Ald. 329; *Peppercorn* vs. *Peacock*, 3 Scott's N. R. 651.

In *Ex parte Bollman*, 4 Cranch, 94–5, the Court was called upon to construe the 14th section of the Judiciary Act of 1789. Marshall, C. J., delivering the opinion of the Court, and referring to the 14th section, says:

"It is in these words: 'That all the before mentioned Courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the Justices of the Supreme Court, as well as Judges of the District Courts, shall have power to issue writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment: *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in goal, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into Court to testify.'

"The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the Courts of the United States to exercise their respective jurisdictions in some causes which they are capable of finally deciding.

"It has been urged that, in strict grammatical construction, these words refer to the last antecedent, which is 'all other writs not specially provided for by statute.'

"This criticism may be correct, and is not entirely without its influence; but the sound construction which the Court thinks it safer to adopt is, that the true sense of the words is to be determined by the nature of the provision and by the context."

The foregoing references are made to show that if I have erred as to the grammatical construction of the clause under consideration, the nature of the provision and the context is the safer and surer criterion by which to ascertain the true sense of the words employed in the clause.

It is submitted that the nature and language of the clause, the context, and the grammatical sense, all indicate a grant

of power not pertaining to original but appellate jurisdiction, and that all the words in the clause prior to the words "necessary or proper to the complete exercise of its appellate jurisdiction" are alike antecedent to the words just quoted; and that which is said by Broom in the passage above referred to may occur, has here occurred; the relative is "connected with nouns which go before the last antecedent, and either take from it or give to it some qualification;" indeed, that all the nouns in the first portion of the clause, including "all other writs," are equally antecedents of the last portion of it. Just here an instance that the context supplies the better criterion by which the meaning of a section may be determined than the grammatical arrangement or construction of it, is furnished in Section 5 of Article VI. In that section, which relates to the Superior Courts, near its close we find this clause:

"Said Courts and their Judges shall have power to issue writs of mandamus, *certiorari*, prohibition, and *habeas corpus*, on petition by or on behalf of any person in actual custody in their respective counties."

This clause, according to its grammatical arrangement, would limit the power by the Courts and Judges mentioned in it, to issue the writs enumerated "on petitition by or on behalf of any person in actual custody in their respective counties." The grammatical construction would be such as just stated, following the grammatical arrangement of the words. No one would say that this interpretation would be what was intended by the framers of the instrument. The writs enumerated, other than that of *habeas corpus*, would not be required by or on behalf of a person in custody. The writ of *habeas corpus* would be amply sufficient to redress the wrongs of a person in confinement, and would be an ample remedy for a person so situated. The context of the entire section indicates beyond a doubt that the intention was to confer jurisdiction upon the Courts and the Judges mentioned in cases where the writs named would be appropriate as remedies; and the construction should be in accordance with this manifested intention.

Again, it is a general rule in the construction of writings that where a general intent appears it shall control the particular intent. (See Cooley's Const. Lim., p. 58, note 4.) "Particular clauses of a contract are subordinate to its general intent." (C. C., Sec. 1650.) The general intent manifest in this 4th section under examination is to grant *appellate* and not *original* jurisdiction. The intent to grant *original* jurisdiction, if at all apparent, can scarcely be held to be

of a character which is not subordinate to the general intent so clearly manifested.

It is urged as a reason why the construction given to the fourth section of Article VI herein should not be adopted, that if such interpretation be adhered to there will be a class of cases in which the writs of mandamus, *certiorari*, and prohibition are issued for their adjudication by the Superior Courts, when the judgments of the last named courts will be final. In other words, that there will be no appeal from the judgments of the Superior Courts in such cases, as the appellate jurisdiction of this Court as defined in this section will not embrace them. And therefore, if this Court cannot reach those cases by issuing the writs referred to on application to it without recourse to the Superior Courts, the judgment of this Court cannot be procured at all in such cases.

It is admitted that this may be true as to a few cases, and in consequence it may be that some apparent inconvenience or hardship may result. But in reply to this argument, we urge that it is much better to submit to this inconvenience, which may be easily remedied by amendment, than by construction to insert something in the organic law which its language does not justify. The inconvenience is uncertain, and if it exists at all, will be but temporary; while such a construction tends to lessen respect for the Constitution, and inflicts upon it a blow which results in permanent injury. "If the law does not work well," says Bronson, C. J., in *Oakley* vs. *Aspinwall* (see 3 N. Y. 568), "the people can amend it; and inconveniences can be borne long enough to await that process. But if the Legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the Constitution which nothing can heal. One step taken by the Legislature or Judiciary in enlarging the powers of the Government, opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of the Government are just what those in authority please to call them."

In looking into the matter under discussion, we turn almost as a matter of course to the clause as it stood in the former Constitution, under the amendment of 1863, in which shape it continued until changed by the present Constitution. (See Article VI, Section 4 of the old Constitution.) By that section *appellate jurisdiction* was granted to the Supreme Court, and then comes the clause to which attention is called. It is in these words: "The Court shall also have

power to issue writs of mandamus, *certiorari*, prohibition, and *habeas corpus*, and also all writs necessary or proper to the complete exercise of its appellate jurisdiction." A comparison of the clauses in the two sections is suggestive. The difference is at once remarked. Instead of "*and also all writs*" in the old Constitution, we find the words "and all other writs" in the new.

This 4th section of the old Constitution came under consideration in 1864, in the case of *Tyler* vs. *Houghton*, 25 Cal. 27. The point presented for determination was whether the Supreme Court of that day had original jurisdiction, under the section referred to, to issue the writ of mandamus. The Court came to the conclusion that this section conferred such jurisdiction. This decision may be regarded as settling the question under the former Constitution. It was approved in *Miller* vs. *Board of Supervisors of Sacramento County*, 25 Cal. 96, and in *People* vs. *Loucks*, 28 *Id.* 71. It remained undisturbed during the existence of that Constitution, and was the undoubted law of the land during the period the late convention was in session. The members of that body, composing a fair representation of the intelligent men of the State, and of the ablest and most learned members of the legal profession within its borders, must have been aware that such was the settled law of California. Notwithstanding all this, the clause referred to was changed; and changed, too, by the substitution of words, the meaning of which cannot be said to be the same as those in place of which they were inserted.

The inquiry at once is suggested, why the change? Why was it made, unless it was to change the organic law of the State?

The opinion in *Tyler* vs. *Houghton* was drawn up by Sanderson, C. J., one of the ablest and most learned members of that able and learned Court. There was no dissent. The Court held that there were two independent grants of power in the clause. The first grant was the power to issue the writs named, and the second and additional grant of power to issue *all* writs necessary or proper to the complete exercise of the appellate jurisdiction of the Court. This is a fair statement of the conclusions reached by the Court. (See opinion, pp. 28 and 29 of 25th Cal. Reports.)

I think I have shown that it cannot be maintained by any method of argument that there are two independent grants of power in the corresponding clause in the new Constitution. To do this would be to strike from the instrument the significant word "other" by ignoring its meaning en-

tirely. Read as two separate and independent grants, we say of one that the power in the Court to issue writs necessary or proper to the complete exercise of its appellate jurisdiction must be confined to writs other than the writs of mandamus, *certiorari*, prohibition, and *habeas corpus*, specifically named in the first portion of the clause. This inference in my view is just from the premises indicated, and leads to a consequence which this Court cannot adopt, unless it divests itself of a power among the most important of any with which the organic law invests it.

But it is said that under the old Constitution of 1849 the Supreme Court was allowed to issue these writs only in the exercise of its appellate jurisdiction; that it was so declared by that Constitution, and so adjudged by the Supreme Court organized under it; and the inquiry is made, if the convention which framed the present Constitution desired to restrict this Supreme Court as the Supreme Court was under the instrument of 1849, why had not the convention used the same language.

In answer to this I say that it cannot be maintained that the intention of the framers of the Constitution was to grant original jurisdiction by the clause referred to, because they did not use the same or equivalent words to those used in the Constitution of 1849, where confessedly no original jurisdiction was given in the matters of the writs referred to except the writ of *habeas corpus*. There are many ways of saying as plainly that the Court was not invested with original jurisdiction as was said in the Constitution of 1849. And no inference can fairly be drawn that original jurisdiction was intended to be given because the Convention did not use the same language in the present Constitution, identical with that used in the instrument of 1849, when the phraseology employed as plainly indicated the intent that the writs named should not be resorted to in the exercise of a jurisdiction which is original.

We may well conclude that the late Constitutional Convention saw, what was apparent to every citizen of the State, that the then Supreme Court was crowded with causes brought before it on appeal, the proper disposition of which required all the time which the Judges of that Court could devote to hearing and deciding them; that much of the time required for the hearing and deciding of such cases was consumed by applications for writs of mandamus, *certiorari*, and prohibition, from which much delay was unavoidably caused in passing on the causes appealed; and therefore that that learned body, recognizing the evil consequences which had

resulted from the delay referred to, determined to remove one of the chief causes of the delay, and to take away the original jurisdiction.

This, in my opinion, was one of the main reasons operating on the minds of the members of the convention in making the change alluded to; and such is my answer to the inquiry why such change was made.

For these reasons I have come to the conclusion that this Court has no original jurisdiction to issue the writ of mandamus. The same reasons obviously apply, and the same conclusion is reached, as to the writs of *certiorari* and prohibition. It has a qualified original jurisdiction as to the writ of *habeas corpus*, by reason of the power vested by the last clause of the section referred to in each member of the Court to issue the writ and make it returnable before the whole Court. As to this writ, it cannot initiate the proceedings as a matter of jurisdiction original, but can hear and determine a proceeding on such writ issued as just above pointed out.

Other considerations are suggested to sustain this view, but I forbear to urge them.

As to the other points considered in the opinion of the majority, I concur in the conclusions therein announced.

THORNTON, J.

DEPARTMENT No. 1.

[Filed July 19, 1880.]

[No. 6969.]

GILMORE, RESPONDENT,

vs.

LYCOMING INSURANCE COMPANY, APPELLANT.

PLEADING—INSUFFICIENT COMPLAINT. Where a party relies upon a contract in writing, and it affirmatively appears that all the terms of the contract are not stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Benson & Wells, for respondent.
Gray & Haven, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

The demurrer to the complaint should have been sustained Where a party relies upon a contract in writing, and it affir-

matively appears that all the terms of the contract are not set forth in *hæc verba*, nor stated in their legal effect, but that a portion which may be material has been omitted, the complaint is insufficient. Here the plaintiff alleges that, for sufficient consideration, the parties entered into a contract of insurance, a copy whereof is annexed as part of the complaint. The policy contains the provision following:

"Sum insured, $650. Time, one year. Rate, 3.50 per cent. Premium, $22.75.

"And the said Lycoming Fire Insurance Company hereby agree to make good unto the said assured, her executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire or lightning to the property so specified, from the 24th day of June, 1878, at 12 o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid ninety days after due notice and proofs of the same shall have been made by the assured and received at this office, in accordance with the terms and provisions of this policy, unless the property be replaced, or the company shall have given notice of their intention to build or repair the damaged premises. *Reference being had to the application of the assured, which forms a part of this policy*, and is a warranty on the part of the assured.

"1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of the contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk or over valuation, or any misrepresentation whatever, *either in a written application* or otherwise; or if the assured shall have or shall hereafter make any other insurance of the property hereby insured, or any part thereof, without the consent of the company written hereon, or if the above mentioned premises shall be occupied or used so as to increase the risk, or become vacant and unoccupied more than thirty days, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever, without the assent of this company endorsed hereon," etc.

The application of the assured is not set forth in the complaint, nor are its contents alleged. Yet, as we have seen,

the application "forms a part" of the policy. The plaintiff avers that she has "duly performed all the conditions" of the contract on her part, but the averment fails to make the complaint complete in the absence of a portion of the policy which is necessary to explain the agreement as a whole, and which in connection with the policy proper may determine what the conditions are. (See *Bobbitt* vs. *L. & L. & Globe Ins. Co.*, 66 N. C. 70.)

Judgment and order reversed, and cause remanded to the Court below, with directions to sustain the demurrer to plaintiff's complaint, with leave to amend.

We concur: Sharpstein, J., McKee, J.

DEPARTMENT No. 1.

[Filed July 20, 1880.]

[No. 7015.]

EDDELBUTTEL ET AL., APPELLANTS,

vs.

ORRIN DURRELL ET AL., RESPONDENTS.

STATEMENT ON MOTION FOR NEW TRIAL. The purpose of Section 659 of the Code of Civil Procedure was to direct the attention of Court and counsel to the particulars relied on by the moving party, so that the evidence bearing on the specifications of error might be inserted in the statement, and considered by the Court.

Appeal from the District Court of the Twenty-first Judicial District, Plumas County.

R. H. F. Variel, *W. W. Kellogg*, and *J. D. Goodwin*, for appellants.

E. T. Hogan, for respondents.

Ross, J., delivered the opinion of the Court:

The plaintiffs by this action sought to restrain the defendants from the diversion of certain waters of a certain creek in Plumas County. The grounds for the relief asked are thus stated in the amended complaint: "Plaintiffs, by this amended complaint, for a cause of action allege: That since the 10th day of December, 1875, they have been and they now are the owners of and entitled to the use, occupation, and possession of all the waters naturally flowing in the south branch of Willow Creek, in Plumas Township, Plumas County, California, except that certain amount to which the defendants, or some of them, as owners of a certain ditch known as the 'Old Hardy Ditch,' are entitled, the said

amount being not to exceed forty (40) inches, according to miner's measure. That since the said 10th day of December, 1875, and up to the entry of the defendants hereinafter set forth, these plaintiffs have been in the continuous use, occupation, and possession of said waters in the working of certain mining claims, situated in the bed of said creek below where the said Hardy ditch diverts water from the same. That on or about the 10th day of November, 1878, the said defendants proceeded to enlarge the said Hardy ditch, and to divert thereby all the waters flowing in said creek; and they have ever since remained in the possession of the whole of said waters, and have deprived and threatened to deprive these plaintiffs of the use of the same."

The first, second, and third findings of the Court below are as follows:

"*First.* That at no time since the 10th day of December, A. D. 1875, were the plaintiffs, or either of them, the owners of the whole or any part of the waters naturally flowing in the south branch of the Willow Creek described in their amended complaint herein.

"*Second.* That at various times between the 10th day of December, 1875, and some time in October, 1878, the said plaintiffs used, in mining the bed of said south branch of Willow Creek, such portion of the waters thereof as flowed past the head dam of the Hardy ditch referred to in the amended complaint; and such use is the only evidence produced of possession of the said waters on the part of plaintiffs.

"*Third.* That on the 10th day of November, 1878, nor at any time between that date and the commencement of this action, were said plaintiffs, or either of them, in the possession or entitled to the possession of any of the waters of said south branch of Willow Creek."

The specifications of error found in the statement on motion for a new trial are in these words:

"*First.* The first finding of the Court is not sustained by the evidence, and it is contrary thereto.

"*Second.* The second finding is not sustained by the evidence, and it is contrary thereto.

"*Third.* The third finding is not sustained by the evidence, and it is contrary thereto."

By Section 659 of the Code of Civil Procedure it is provided that "when the notice of the motion (for a new trial) designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify *the particulars in which such evidence is*

alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. *If no such specifications be made, the statement shall be disregarded* on the hearing of the motion."

This is statute law, and we must obey it. In the case before us there is not even an attempt made to specify the particulars in which the evidence is alleged to be insufficient to sustain the findings of the Court below. Appellants might as well have said, in a general way, that none of the findings of the Court were sustained by the evidence.

The purpose of the statute is apparent. It was to direct the attention of Court and counsel to the particulars relied on by the moving party, to the end that the evidence bearing on the specifications of error might be inserted in the statement and considered by the Court.

Judgment and order are affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT NO. 1.

[Filed July 20, 1880.]

[No. 10,502.]

THE PEOPLE OF THE STATE OF CALIFORNIA, APPELLANT.

VS.

JOHN FRESHOUR, RESPONDENT.

TESTIMONY IN CRIMINAL CASES. When a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on that subject, even though his answers may criminate or disgrace him.

Appeal from the County Court of Tulare County.

Attorney-General Hart, for respondent.
Atwell & Broelling, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

The convict Randall—who was a witness called by the prosecution—having testified very fully as to his own connection with the actual commission of the alleged crime—that he was present at and a party to the larceny charged against the

defendant—was asked by counsel for defendant: "State the general plan which you and the defendant entered into with reference to stealing these cattle?" To which witness said: "I decline to answer." The Court: "What is your reason for declining?" Answer: "On the ground that it would criminate me in other circumstances." By the Court: "In other crimes?" Answer: "Yes." The Court then said: "I have no power to compel the witness to answer any such questions." To which ruling defendant then and there duly excepted.

The witness should not have been permitted to separate the actual taking of the property from the plan of the parties to the taking. His recital of the alleged plan or agreement might have tended to show that the connection of defendant with the actual taking was innocent—as that he supposed the cattle to be the property of the witness, and was employed by him—or might have led to such expansion of the narrative by witness as would leave him open to contradiction, or to impeachment by reason of the improbabilities of his story. Defendant was entitled to a full history of all that tended to explain the nature and degree of his complicity with the acts of the witness. The scheme of the parties and the acts following were part of one transaction; and when a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on that subject, even though his answers may criminate or disgrace him. (*Town* vs. *Gaylord*, 28 Conn. 309.) If the witness had been compelled to give his version of the agreement, it would have aided the jury in determining how far his testimony was credible. He had already testified that there were *other* parties to the criminal agreement, but it was neither his moral duty nor legal privilege to protect *them* at the expense of the defendant on trial. If when he had given his version of the plan he had stated there were no other parties to it than defendant and himself, he would have shown that this or his former statement was untrue; if he had named other parties, *they* might have been called to disprove the accusation, and thus discredit the whole of his testimony. It is enough, however, to say that he had already admitted that the conspiracy contemplated and provided for the commission of the particular overt act charged in the indictment. If a witness discloses a part of a transaction with which he was criminally concerned, without claiming his privilege, he must disclose the whole. (10 Foster, 540.)

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed July 19, 1880.]

[No. 6567.]

J. H. LUCAS, RESPONDENT, vs. PIO PICO, APPELLANT.

CONSIDERATION OF PROMISSORY NOTE. It is not an immoral act to give information about an outstanding title to a tract of land in the adverse possession of another, or to render services in the acquisition of such a title; and such was a good consideration for a promissory note.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Bicknell & White, for respondent.
Glassell, Smith & Smith, for appellant.

McKEE, J., delivered the opinion of the Court:

On the trial of this case, the defendant in the Court below objected to the offer of the promissory note in evidence, because it appeared from the testimony that the consideration of the note was contrary to public policy and morality, and specially that it was barratrous; and because it also appeared that the note itself had not been assigned to the plaintiff before the commencement of the action, and as the plaintiff was not the legal owner thereof, he could not maintain the action. The defendant also moved for a nonsuit upon substantially the same grounds. Both his objections and motion were overruled by the Court; and he brings the case here on appeal for review.

The note which forms the subject matter of controversy in the case is in the following words and figures:

"$800. LOS ANGELES, October 22, 1877.

"At eight months from this date I promise to pay to F. P. Johnson, in person, for understood value, the sum of eight hundred dollars in gold coin of the United States of America. PIO PICO."

This note was given under the following circumstances: Juan de Toro, a searcher of records, while examining the records of deeds in the Recorder's office in Los Angeles County, discovered that two patents had been granted to the city of Los Angeles for city lands, and that there was a person in the adverse possession of a tract of those lands, the title to which, under one of the patents, was outstanding in another. On ascertaining this condition of the title, Toro associated with him one Johnson for the purpose of buying

the outstanding title on speculation. To this end Johnson, in behalf of himself and Toro, communicated his information to the defendant. Defendant took counsel upon it, and upon the legal advice which he received he concluded to buy the outstanding title. For that purpose he agreed with Johnson to pay $2,000 for it, if the latter would obtain for him a deed from the owner. Johnson procured the deed, and when it was delivered to the defendant the latter paid the purchase money, and at the same time made and delivered to Johnson the note in controversy, and also made and delivered one of like import to Toro, for the information which they had given and the services which they had rendered in procuring the title.

We see nothing in the transaction which violates good morals. It is not an immoral act to give information about an outstanding title to a tract of land which is in the adverse possession of another, or to render services in the acquisition of such a title. Nor is there anything in such a transaction which would be likely to prove prejudicial to the morals of the community. The law does not prohibit the purchase of such a title; and any lawful act which has for its object the accomplishment of such a purpose cannot be considered as against public policy or the policy of the law. An act which does not violate any rules or principles of law, and is not evasive of anything which is established by law, or which the law aims to promote, is not against public policy or the policy of the law.

Nor is the transaction barratrous. Barratry is made an indictable offense both by common law and the Penal Code of the State. By the latter it is defined to be the practice of exciting groundless judicial proceedings. But no person can be convicted of such an offense, except upon proof that he has excited suits or proceedings at law in at least three instances, and with a corrupt or malicious intent to vex and annoy. (Secs. 156, 159, P. C.) Nothing in the transaction under consideration tends to show that any of the parties concerned in it have fomented, or attempted to foment, law suits or quarrels about the property which was the subject of the purchase. They aided in purchasing an outstanding title to it, the validity of which depends upon the patent to the city of Los Angeles, from which the title is deraignable. At common law such a purchase would have been considered void; and it would not have been a valid consideration for a promissory note or other contract, for that law prohibited the acquisition of a title to land from one who was not in the actual possession of the land. The maxim of the law, as laid

down by Lord Coke, is that nothing in action, entry, or reentry can be granted, for the reason that under color thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed. (4 Kent's Commentaries, 447.) But that rule has never prevailed in this State. By the Civil Code of the State any person claiming title to real estate in the adverse possession of another, may transfer it with the same effect as if in the actual possession. (Sec. 1047, C. C.) To participate in any capacity, whether as principal or agent or broker, in a transaction for obtaining a transfer of title to land in that condition, is neither barratrous or champertous. Being an act which is authorized by law, it is neither *malum in se* or *malum prohibitum*. It is not indictable, or subject to a penalty or forfeiture; and it follows that the consideration of the contract in controversy was not against good morals or public policy, or tainted with barratry.

And the contract itself, though non-negotiable, was endorsable; for a non-negotiable contract is, by law, assignable by endorsement in like manner with negotiable instruments—subject, of course, to all equities and defenses existing in favor of the maker at the time of the endorsement. (Sec. 368, C. C. P., and Sec. 1459, C. C.) It is that which constitutes the principal difference between negotiable and non-negotiable contracts.

After the payee had specially endorsed the contract in this case and delivered it to his assignee, and the latter qualifiedly endorsed it and delivered it to one Higgins, who sold and delivered it to the plaintiff, any subsequent holder from Higgins might take the same by mere delivery, and make himself the assignee of the last assignor by filling up the endorsement in his own name. But whether this was done or not, the holder was the proper party to sue; for the holder of a non-negotiable contract is presumptively the owner, and, as the real party in interest, he is entitled to maintain an action upon it in his own name. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by law. (Sec. 367, C. C. P.) When therefore the Court permitted the plaintiff at the trial to fill up the endorsement on the contract to himself, we think there was no error which prejudiced the defendant. (*Poorman* vs. *Mills & Co.*, 35 Cal. 118.)

Judgment and order affirmed.

I concur: McKinstry, J.

I concur in the judgment: Ross, J.

DEPARTMENT NO. 2.

[Filed July 19, 1880.]
[No. 6815.]

JAMES F. FREY, RESPONDENT, vs. A. ASTELL, APPELLANT.

JURISDICTION OF JUSTICES' COURT. The standard of jurisdiction is "the value of the property," and the incidental damages for the detention are not limited; hence demand for damages does not oust the Justice of jurisdiction, if the value of the property was less than $300.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

L. L. Taylor, for respondent.
Chas. A. Warring, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

The judgment of the District Judge dismissing the writ of *certiorari* would, perhaps, have been more regular in form if it had affirmed the judgment of the Justice; but the appellant has suffered no injury from it, and cannot complain of this. The test of the jurisdiction of the District and Justice Court respectively, under the former Constitution, was "the demand, exclusive of interest, of the value of the property in controversy." (Constitution of 1849, Article VI, Sections 6 and 7.) There were two classes of cases, in one of which the *demand*, and in the other of which the value of the property was referred to as determinative of the question of jurisdiction. The primary purpose of an action "for the recovery of specific personal property" is, as its name indicates, to recover specific property; the judgment for its value, in case the property has not been and cannot be returned, is an alternative. The District Court would not have had jurisdiction of the cause of *Frey* vs. *Astell*, because the value of the property was not $300. This view is somewhat strengthened by the analogies. The Constitution provided that the District Court should have jurisdiction when the demand, "exclusive of interest," was for $300 or more. The Justices, therefore, had power to render a judgment for any amount, however great, provided it was made up in part of a principal of less than $300. It would seem, in like manner, that when the standard of jurisdiction is "the value of the property," the recovery of which is the main object of the proceeding, the incidental damages for the detention are not limited. This, however, it is not necessary to decide; it may be that the demand for damages for the detention is mere surplusage. We only say that such demand did not oust the

Justice of jurisdiction, since he had jurisdiction if the value of the property was less than $300. (C. C. P., Sec. 114, subd. 5.)

Judgment and order affirmed.

We concur: Ross, J., McKee, J.

Legal Facetiæ.

IN a recent murder trial in Maine, a Mrs. Flanagan testified that the defendant had confessed the crime to her; whereupon the defense called an old fellow to impeach her veracity. He was asked if he knew her reputation for truth and veracity, and answered, "Wall, Squire, I guess she'd tell the truth; but about her veracity—well, now some say she would, and some say she wouldn't."

***

[As a neat, ingenious bit of verse, the following could scarcely be excelled. It will be observed that no two stanzas have the same rhyme to the word "him." We extract it from the *Journal of Jurisprudence and Scottish Law Magazine.*]

THE SUCCESSFUL COUNSEL.

A HYMN TO HIM.

"And o'er the hills and far away,
Beyond their utmost purple rim,
Beyond the night, across the day,
The happy princess followed him."—TENNYSON.

How rapidly he makes his way,
This most successful legal limb!
Through half the night and all the day
The happy agents follow him.

There falleth from his fluent lips
The wisdom of the seraphim;
And every buzzy-body sips
The honey that's distilled by him.

He's witty too. You jest: thereat
You see their Lordships looking prim.
Your favorite joke, that fell so flat,
Is exquisite when said by him.

We gaze on, wheresoe'er he goes,
His figure, be it squat or slim;
And even to his boots and "clos"
The wondering juniors copy him.

The briefless, pacing day by day
The weary boards, "not in the swim,"
With grief, but not with grammar, say
"We wish to goodness we were him!"

He snubs, he sneers, he jibes, he frowns,
Then smiles illume his visage grim;
We bear his temper's ups and downs,
And e'en the Judges bow to him.

"'Tis only pretty Fanny's way,"
And "geniuses must have their whim;"
Whate'er he says, or doesn't say,
The happy agents follow him.

Retainers of both kinds he hath:
His Pistol, Bardolph, Peto, Nym,
Enjoy his smiles, endure his wrath,
And serve as useful foils to him.

Law only charms this legal swell:
A primrose by the river's brim
(See Wordsworth, case of "Peter Bell")
A primrose only is to him.

You talk about historic times—
The strife of Stafford, Hampden. Prim;
Of art; the last new poet's rhymes:—
A vacant stare's vouchsafed by him.

Of politics he knows but this—
It does not pay to turn and trim;
Nor cares for them, yet must not miss
What prize may be in store for him.

Time passes: he becomes a Judge.
Sudden his lustre groweth dim;
His wisdom now you call it fudge,
And no one cares a rap for him.

Ah! every dog must have his day,
He's no more now than Jack or Jim;
And all the happier agents say
"Sir Newman quite eclipses him!"

He sees his sun of glory set
'Neath the horizon's purple rim;
And thinks of days, with grim regret,
When crowds of clients followed him.

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TO SUBSCRIBERS.

Subscribers are hereby notified that between this time and August 21st—the end of Volume V—we shall forward all accounts due the PACIFIC COAST LAW JOURNAL through Wells, Fargo & Co. for collection. After that date the JOURNAL will not be sent to delinquents of one year's standing until the *old accounts are paid up*. The subscription price of the JOURNAL is $6.50 per year, or $3.50 for six months, payable IN ADVANCE. This mode of collection is a matter of convenience to us, and applies to all bills.

Current Topics.

In the June number (1880) of the *Journal of Jurisprudence and Scottish Law Magazine*, the Tiburcio Parrott case, lately decided here by the United States Circuit Court, is cited at length, and closes with the following compliment to the American judiciary, mingled with the usual praise bestowed upon the honor and glory of English institutions:

"It is with no little pleasure that we have read the report of this judgment. That it is a just decision, we have no doubt whatever. But in order to be just, one requires to resist the influences by which he is surrounded—the subtle and permeating influences which creep unconsciously into the mind, and indeed become part of the mind itself; and to do so requires some firmness and some fortitude. To the influences of popular opinion the American Judges are exceptionally exposed, deriving their authority from a more popular and fluctuating source than our Judges do, and holding their office by a less secure tenure. These popular influences were in the present instance exceptionally strong. The feeling of the populace in California has been running in a swift and steady current against the Chinese immigrants. The antipathy to these competitors in the labor market found expression in the Constitution of the State and in the Act of the Legislature; but the Californian Judges

have plainly told the people and the Legislature that they were there, not to execute the behests either of the people or of the Legislature, but to administer justice according to the Constitution of the country. They were, to use the words of one of the greatest of Scotsmen—'they were in the place where they were demanded of their conscience to speak the truth, and therefore the truth they did speak, impugn it whoso list.' It is not the first time in history that reason and rectitude and respect for the laws and the Constitution, hunted from every other asylum, from the council and the senate—even from the hearts and minds of men—have found a secure refuge in the courts of justice. It is a proud thing to be able to say that no man, be he ever so humble—no race, be it ever so oppressed or despised—comes before the courts of Britain or America invoking the protection of the laws, without finding that their trust has been securely placed. It is with pardonable pride that we in Scotland can remember that it was in our courts the first judicial declaration was made of the great principle that the moment a slave set his foot on British soil his bonds fell from him, and he stood a free man. * * * Nothing more than the fearless independence and uprightness of the Anglo-Saxon Judges tends to give stability to any society, and the existence of men in it who, when they have discovered what they believe to be the reason and truth and justice of a case, can say, despite every adverse influence, 'On this rock I take my stand, come what come may.' In our own country, in old time and in new, our Judges have with an equal mind maintained the laws of the land against prince and peer, and Parliament and people; and we are proud to recognize that among 'our kin beyond the sea' the Judges, in opposing influences which have assumed a novel form, but which are of a not less menacing character, have exhibited the spirit of their race, and have maintained the honorable tradition of their honorable office."

In the name of the American judiciary, so far as we are authorized to express the same, we say "thanks." United States Judges, however, are not dependent upon "popular influences," but hold life positions. Our courts generally decide according to law, as they construe and understand it; and we may safely say that our Judges have always decided cases according to their convictions. We are glad to have our judiciary placed upon the high and honorable plane accorded it in England; provided always, Jeffreys and others

are not included, as well as the Scotch Judge who, the other day, entered judgment for the plaintiff, although the verdict was for defendant. With the exception of Ireland's wrongs, English slave ships, the enforced cultivation of opium in China, the Zulu war, etc., we are in accord with the above writer in relation to the justice accorded suffering humanity by England.

ALTHOUGH a man cannot change his name, except in pursuance of law and proceedings commenced therefor, yet he may sell the use of his name, and be prevented by injunction from using it. A case in point is that of *Skinner* vs. *Oakes*, recently decided at St. Louis. It appears that Oakes & Probasco were partners in the manufacture of an article of taffy called "Oakes' Candies," which were so popular that those who once tasted them would have no other. The candy store was sold out to Skinner, the plaintiff, with the right to make the "Oakes" brand of candies. Oakes, notwithstanding the sale, opened a new shop, and resumed the manufacture of Oakes' candies. Skinner commenced proceedings to enjoin Oakes from using his own name in the business, and calling his candies by that name. The Court granted an injunction, delivering a lengthy written opinion. The brand "Oakes," applied to candies, was a trade-mark which Skinner had purchased of Oakes; and the latter, by using the same, although his own name, infringed upon the right of Skinner. The Judge (BOYLE) says further: "I am also of opinion that this restriction is not confined simply to the use of the words 'Oakes' Candies' as forming a single name, but for the use of the word 'Oakes' at all in connection with the manufacture or sale of candies in this city; for to place this name in a position that it may be read at the same time or place that candies are displayed, is to impress upon the mind 'Oakes' candies, just as clearly and unmistakably as if the words 'Oakes' and 'Candies' were printed or painted upon a sign as forming but one name. If one in search for what is known as Oakes' candies finds a store containing candies, and upon its sign the name of Oakes, he would be simply an idiot not to connect the one with the other, and believe he had found the object of his search."

Supreme Court of California.

DEPARTMENT NO. 2.

[Filed July 20, 1880.]

[No. 10,490.]

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT,

VS.

C. W. REDINGER, APPELLANT.

ESCAPE OF CRIMINAL PENDING APPEAL. In this case defendant was convicted of murder in the first degree, and was sentenced to be hanged. An appeal was taken, pending which defendant escaped from custody. On motion of the Attorney-General to dismiss the appeal, it was held that, although defendant could not prosecute appeal by counsel, having waived that right by breaking jail, yet the motion to dismiss was denied, but ordered that the appeal stand dismissed unless defendant return to custody before May 1, 1881.

APPEARANCE BY COUNSEL. A convicted murderer has no right to appear by counsel in an appeal from the judgment of the lower Court, where it appears that he has escaped from custody; and his appeal will be dismissed unless he return to custody.

Appeal from the Superior Court of Colusa County.

Attorney-General Hart, for respondent.

John C. Dewel, for appellant.

THORNTON, J., delivered the opinion of the Court:

The defendant was indicted for the murder of one James King; was tried in the District Court of Colusa County under this indictment, and on the 16th of December, 1870, convicted of murder in the first degree. The defendant moved for a new trial, which was denied. The Court in due course pronounced sentence of death by hanging. The defendant prosecuted an appeal to this Court, notice of the same having been served on the 9th of February, 1880, and the cause was here for argument at the session of May, 1880, held at the City of Sacramento.

When the cause was called for argument, the Attorney-General, Hon. A. L. Hart, moved the Court for an order dismissing the appeal on the ground that since the appeal was taken the defendant had escaped from jail, and was no longer in custody to abide the sentence of the Court. This fact is certified to the Court by the affidavit of John M. Steele, the Sheriff of the county aforesaid, in whose custody the prisoner had been since the conviction and sentence above mentioned, who deposes under oath that the defendant, by strategem and force, on the 5th day of April last, escaped from the jail aforesaid, and was then at large. The affidavit

bears date the 19th day of May, 1880. Of the escape there is no denial.

The question is one of interest and importance; is new in this State, no case decided by any of its courts having been produced to us. Several cases were called to our attention on the argument of this motion, and a reply has been made to the argument by John C. Denol, Esq., on behalf of defendant, who, we are informed, was authorized to appear in this Court as defendant's counsel. An objection was taken by the Attorney-General to any one being heard for the defendant, on the ground that this Court ought not to recognize any one as counsel for him after he had voluntarily withdrawn himself from the jurisdiction of this Court and the Court in which the conviction was had and sentence pronounced. However, a brief was allowed to be filed on behalf of defendant, which has been since done.

In discussing the motion, several cases were brought to our notice by the Attorney-General. We have examined these cases and others not cited on the argument.

The earliest decision bearing on the point is in an anonymous case in Maine (Sec. 31, Maine 592), decided in 1850. It is thus reported: "A defendant has been tried and convicted upon an indictment for an aggravated offense. He excepted, and was committed for want of sureties to appear at the law term, at which the exceptions were to be heard. Meanwhile he escaped. His counsel proposed to argue the exceptions. But the Court declined to hear the case until the defendant should be again in custody."

Sherman vs. *Commonwealth* was decided by the Virginia Court of Appeals in 1858. (See 14 Grattan, 677.) In this case Sherman was convicted of a felony, and was sentenced to six years' imprisonment in the penitentiary. He obtained a writ of error from the Court of Appeals, which was directed to operate as a *supersedeas* to the judgment. While it was pending in the Appellate Court, Sherman broke jail and absconded. The Attorney-General moved the Court for a rule upon the prisoner to show cause why the Court should not set aside the *supersedeas*, or postpone the hearing of the cause until the prisoner should return to the proper custody. This order was made, and the motion was afterward argued on behalf of the Commonwealth and the plaintiff in error. The Court adjudged that so much of the order awarding the writ of error as directed it to operate as a *supersedeas* be discharged, and further ordered that the writ of error be dismissed on the 1st of May next, 1859, unless it should be made to appear to the Court on or before the day above

named that the plaintiff in error is in the custody of the proper officers of the law. This judgment was afterwards approved by the same Court in Leftwich's case, in which defendant had been convicted of a felony. (See 20 Gratt. p. 723, decided in 1870.)

The case cited from Massachusetts (*Comm.* vs. *Andrews*, 97 Mass. 543) was decided in 1867. Andrews was convicted of receiving stolen property. He alleged exceptions, which were allowed, and was held in jail to prosecute. When the case was called in the Supreme Court, the Attorney-General suggested that the defendant had broken jail and was at large, and asked that he should be defaulted, and the exceptions overruled without argument. The Court heard argument on the motion by the counsel for defendant, who stated (as appears from the report) the points in his behalf with force and clearness; and we would infer, from what is stated in the report, that the motion was elaborately argued by the counsel who spoke for the defendant. The Court granted the motion. We insert here the brief opinion:

"The defendant, by escaping from jail, where he was held for the purpose of prosecuting these exceptions and abiding the judgment of the Court thereon, has voluntarily withdrawn himself from the jurisdiction of the Court. He is not present in person, nor can he be heard by attorney. A hearing would avail nothing. If a new trial should be ordered, he is not here to answer further; if the exceptions are overruled, a sentence cannot be pronounced and executed upon him. The Attorney-General has a right to ask that he should be present to receive the judgment of the Court." (1 Chit. Crim. Law, 663; *Rex* vs. *Caudwell*, 17 Q. B. 503.)

So far as the defendant has any right to be heard under the Constitution, he must be deemed to have waived it by escaping from custody, and failing to appear and prosecute his exceptions in person, according to the order of the Court under which he was committed. Defendant defaulted. Exceptions overruled.

The People vs. *Genet*, 59 N. Y. 80 (1874), is also cited. In this case the defendant had been convicted of a felony, and upon this conviction was committed to custody to await sentence pending an application for the settlement of a bill of exceptions. When this bill was presented for settlement, the Court declined to settle it on the ground that the defendant had, since the conviction, escaped from custody; had absconded, and was then at large. An application was made to the Supreme Court for a mandamus to compel the

trial Court to settle and seal the bill of exceptions. The Supreme Court denied the application, and the matter was brought on appeal before the Court of Appeals. This Court affirmed the order of the Supreme Court. The Court of Appeals held it essential to any step, on behalf of a person charged with felony after indictment found, that he should be in actual custody by being in jail, or, constructively, by being let to bail. (59 N. Y. 81.) The Court, per Johnson, J., said:

"The whole theory of criminal proceedings is based upon the idea of the defendant being in the power and under the control of the Court, in his person. While the Constitution and the statute provide him with counsel, and the statutes give the right of appearance by attorney in civil cases, they are silent in respect to the representation of persons charged with felony by means of an attorney; and in regard to those charged with lesser offenses, the statutes permit them to be tried in their absence from court only on the appearance of an attorney duly authorized for that purpose. This authority, it has been held, must be special, and distinctly authorize the proceedings. (*People* vs. *Petry*, 2 Hilt. 525; *People* vs. *Wilkes*, 5 How. Pr. 105.) Even in the absence of statutory regulations, this rule has been enforced in the courts of the United States. (*United States* vs. *Mayo*, 1 Curtis, C. C. 433.) In criminal cases there is no equivalent to the technical appearance by attorney of defendant in civil cases, except the being in actual or constructive custody. When a person charged with felony has escaped out of custody, no order or judgment, if any should be made, can be enforced against him; and courts will not give their time to proceedings which for their effectiveness must depend upon the consent of the person charged with crime." The opinion ends with this remark: "We think they (referring to the statutes of New York giving to defendant a right to make a bill of exceptions) do not require the Courts to encourage escapes and facilitate the evasion of the justice of the State by extending to escaped convicts the means of reviewing their convictions."

In *Smith* vs. *The United States*, 94 U. S. Reports, 97 (1876), the plaintiff in error had been convicted of some offense (the report does not state the offense), and had sued out a writ of error to the United States Supreme Court to have the conviction reversed. Afterward he escaped from custody. The cause was docketed in the Supreme Court December 29, 1870. It had been continued at every term up to the time of the decision, for the reason that no one had

appeared to represent the plaintiff in error. At the October term, 1876, the Court, on motion, dismissed the writ for want of prosecution, but, on motion of counsel for the plaintiff, reinstated it, who moved to have it set down for argument. The Court denied the motion, and ordered that unless the plaintiff in error submitted himself to the jurisdiction of the Court below on or before the first day of the next term of the Court, the cause is to be left off the docket after that time. The Court held, in this case, that it was within its discretion to refuse to hear a criminal case in error, unless the convicted party suing out the writ is where he can be made to respond to any judgment it might render. It thus declared it, per Waite, C. J.:

"In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the Court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence; if we reverse it, and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may be a moot case." (94 U. S. 97.)

In *The Queen* vs. *Caudwell*, 172 Q. B. 503 (November, 1851), the defendant had been convicted of perjury, and sentenced to seven years' transportation. Pigott, for the defendant, was about to move for a new trial. It appeared that the defendant was absent. Lord Campbell, C. J., said: "The defendant must be in Court." Erle, J., concurred, and mentioned a like ruling by Lord Denman in a case where he (Erle) was for the defendant. Lord Campbell added: "This is peculiarly a case where the rule ought to be enforced, because the sentence has been passed on him, and is evaded by his absence. When he appears you may renew your motion." He referred to *Rex* vs. *De Baringer*, 3 M. & S. 67. The motion was not heard, on the ground that the defendant was not forthcoming to meet his sentence. (Campbell, C. J.; Patterson and Erle, JJ., concurring.)

See also *The Queen* vs. *Chichester*, 17 Q. B. 514 (November 24, 1851), where, on motion for judgment against defendant, who had suffered judgment to go by default on an indictment for nuisance, and without *laches* of the prosecution, the defendant having gone out of reach before he could be served with notice to appear for judgment, the Court refused to pass sentence in his absence, although it appeared that the removal of the nuisance, which was to a public nav-

igation, was important, and that the judgment of the Court was wanted to authorize the abating it. The Court held that the remedy was by process of outlawry.

In the case under consideration, has the defendant waived the right to have his case considered and determined? This was held, in so many words, in the case from Massachusetts (*Commonwealth* vs. *Andrews*, *ut supra*), and the same may be regarded as the rule laid down and acted on in the Virginia cases (Sherman's Case and Leftwich's Case, *ut supra*). The determination under the facts here presented not to hear the cases was considered within the discretion of the Court—the discretion to be exercised to be a judicial discretion within limits defined by the law. In Genet's Case (51 N. Y. *ut supra*), the right to have a bill of exceptions settled was held not to exist on behalf of an escaped convict. In the case in Maine (31 *Id.*) the Court refused to hear the argument; and in the case from New York (59 *Id.*) the right to be represented by counsel, guaranteed both by the Constitution and statute to defendants in cases of felony, is held not to exist when the defendant is not actually or constructively in custody, so that the sentence of the Court can be enforced when pronounced. An exception to that rule is referred to in the opinion as to offenses less than felony.

The provision of the Constitution in this State, both in the first Constitution and that recently adopted, as regards this right, is, "*to appear and defend in person and with counsel.*" The former Constitution had appended to this provision, "as in civil actions." That is omitted in the instrument of 1879. The language is suggestive, and indicates that the party charged is not allowed to appear and defend *by* counsel, but *with* counsel—the person acting as counsel to be present with the defendant, and not without him. In these words it seems as if the power to appear and defend, at least in a case amounting to felony, does not exist in the counsel at all in the absence of the defendant. This view seems to be sustained by the statute of this State, and to be derived from a history of the law regarding counsel in criminal cases.

The history of the law as regards capital cases will be found in Blackstone's Commentaries. (See Book 4, 355–6.) This author seems to doubt whether it was not allowed by the ancient law of England, and cites the Mirror, Ch. 3, Sec. 1. In a note it is said that the right of counsel to plead for them was first denied to prisoners by a law of Henry I. (Ch. 47–8), which is construed as an erroneous interpretation of the law. However, this author states it as a settled rule at

common law that no prisoner should be allowed a counsel upon his trial on the general issue in any capital crime, unless some point of law arose which was proper to be debated. This denial was on the ground that the Judge was counsel for the prisoner—a right of but little worth when a Jeffries or a Scroggs presided. The privilege was only accorded in the case of State criminals by the statute of 7 William III., Ch. 3 (Proffatt Jury Trial, Sec. 205). This statute applied to all cases of such high treason as worked corruption of the blood, misprison of treason, except treason in counterfeiting the King's coin or seal; such prisoners were allowed to make their full defense by counsel, not exceeding two, to be named by the prisoner and appointed by court or judge. The same indulgence was extended by statute (20 George III., Ch. 30) to parliamentary impeachments for high treason; "which," says Blackstone, "were excepted in the former Act." (4 Bl. Com. 356.)

Prisoners under a capital charge, whether for treason or felony, upon issues which did not turn on the question of guilty or not guilty, but on collateral facts, always were entitled to the full assistance of counsel. (Foster, 42, 232; Chitty's note on page above cited from Blackstone's Commentaries.)

In misdemeanors the defendant was always allowed counsel as in civil actions. (4 Bl. Com. 356.) In all cases of felony defendants (by statutes 6 and 7 William IV., Ch. 114, Sec. 11) are allowed counsel.

It will be observed from the above that Blackstone refers to *prisoners* as being allowed counsel to appear and defend. He nowhere speaks of any such allowance to persons not in custody. How far is the right secured to persons convicted or charged with public offenses by the statute law of this State? (See Sections 858, 859, 987, 1093, 1095, 1254 of the Penal Code.)

It is apparent from an examination of the above sections that this right is confined to persons charged with a public offense only when in custody. In fact, courts have no jurisdiction over persons charged with crime, unless in custody, actual or constructive. It would be a farce to proceed in a criminal cause, unless the Court had control over the person charged, so that its judgment might be made effective. It is true that an indictment may be found against one not in custody, but steps are directed to be taken in such case to secure his person (Penal Code, Sections 945, 979, 984); and unless an arrest is effected, the cause can proceed no further. The defendant is arraigned in person, and pleads in person

(Sec. 977, Penal Code), unless in case of misdemeanor. (*Id.*) Every plea must be oral. (Penal Code, Sec. 1017.)

By Section 1253 of the Penal Code it is provided, as to criminal causes, that "the judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear;" and by Section 1255 that "the defendant need not personally appear in the Appellate Court." It may be urged that inasmuch as the defendant need not personally appear in the Appellate Court (Section 1255 Penal Code, *ut supra*), he has a right to appear by counsel, whether he is in custody or not.

For the reasons here given, sustained by the cases cited, we think the defendant has no longer a right to appear by counsel when he has escaped from custody until he has returned into custody. By breaking jail and escaping, he has waived the right to have counsel appear for him. (*Commonwealth* vs. *Andrews*, 97 Mass. *ut supra.*) In fact, his right to constitute counsel and invest him with authority no longer exists while his absence from custody continues.

We think it best, in view of all the circumstances, to direct that the motion to dismiss at once be denied; and, although it is unlikely that he will ever surrender himself into custody, it is ordered that the appeal herein stand dismissed unless the defendant shall, before the first Monday of May, 1881, return to the custody of the proper officers of the law. (See the orders in Sherman's Case, 14 Gratt. 677; Leftwich's Case, 20 *Id.* 716; and Smith's Case, 94 U. S. Reports, 97.)

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT NO. 1.

[Filed July 21, 1880.]

[No. 6465.]

H. H. LINNELL, RESPONDENT,

vs.

J. C. FRAISER, APPELLANT.

Appeal from the District Court of the Tenth Judicial District, Colusa County.

John T. Harrington, for respondent.

T. J. Hart and *E. A. Bridgeford*, for appellant.

By the Court:

Upon the authority of *Boedfield* vs. *Read*, No. 6480, the judgment is reversed, and cause remanded.

DEPARTMENT No. 1.

[Filed July 19, 1880.]

[No. 10,509.]

THE PEOPLE, RESPONDENT,

vs.

SILAS ALVITRE, APPELLANT.

EVIDENCE IN CRIMINAL ACTION. Doctrine laid down in *People* vs. *Scroggins*, 37 Cal. 676, in respect to the threats not communicated to the party threatened, adopted. The *threat* in the case at bar is an important circumstance, and admissible in evidence.

Appeal from the County Court of Kern County.

G. V. Smith, District Attorney, for respondent.
R. E. Arick, for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

At 3 o'clock in the morning of the 11th of October, defendant was in bed in the house of one Manuella Sanchez, in a room adjoining that of Manuella and her daughter. Deceased, having ridden a horse to a point about two hundred yards from the house, came to the outer door and (as would seem) demanded admittance, which was refused by the woman Manuella, alleged to have been at one time his mistress; whereupon—as claimed by defendant—deceased burst open the door, and at once leaped upon the defendant, who was still in bed, and commenced stabbing him with a knife. Defendant was badly cut in several places. The testimony for the prosecution, however, if unexplained, would leave it doubtful whether deceased was not fired upon before he commenced to use his knife. Thus Cayetana Barrejon: "I saw deceased, Eugenio Morales, at a distance of seventy or eighty yards. He walked some distance and sat down. I heard the first shot in Manuella Sanchez's house. I was in my room waiting on my child. I jumped out, and when I opened the door I heard a second shot. Four men jumped over the fence at Manuella's. They passed within four or five feet of me. They went to where deceased was, and commenced shooting," etc.

If defendant killed deceased, or was present aiding and abetting the killing, it was certainly important that the jury should be informed of the affray in the Sanchez house, and whether the defendant or deceased was there the assailant.

If defendant was attacked by deceased with a deadly weapon when in bed in his own room, that circumstance was a very grave one to be considered when the jury were determining whether defendant had been provoked, and the degree of provocation, and whether sufficient time had elapsed for defendant's passion to cool. The defendant was found guilty of murder, and any evidence tending to prove that the original assault was by the deceased with a deadly weapon had a bearing upon the question whether the offense was murder or manslaughter.

John Crawford, a witness for the defense, was asked: "State whether you ever had any conversation with deceased relative to any difficulty that he had with defendant, when it was, and what was said, if anything?" Objected to. The Court: "Unless you can show that these threats were communicated to defendant, the testimony is not admissible."

Defendant, by his counsel, for the purpose of showing the intention of the deceased to attack the defendant, and to show the intent with which Morales resorted to the house of Manuella, and also his feelings towards defendant, offered to prove by John Crawford, a competent witness, then upon the witness stand, duly sworn as such, that shortly prior to the difficulty between the defendant and Morales, the deceased made threats against the life of the defendant, stating that he "intended to kill defendant." Objected to, and the Court refused to permit the witness to testify, to which ruling of the Court the defendant then and there excepted.

This was error. In *People* vs. *Arnold*, 15 Cal. 476, it was held that when a rencounter occurs between two persons, one of whom is killed, and the circumstances are equivocal as to which one of the two commenced the affray, the fact that one of the parties had previously procured a weapon for the avowed purpose of using it against the other—although the fact is not communicated to defendant—is a circumstance tending to show that the purpose was fulfilled. And the same doctrine in respect to the threats, not communicated to the party threatened, is adopted in *People* vs. *Scroggins*, 37 Cal. 676. In the case before us deceased was not killed at the affray in the house—treating that as a separate affray—but the *threat* became an equally important circumstance, since upon the termination of the question, *by whom was that affray commenced*, may have depended the verdict of murder instead of manslaughter.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

DEPARTMENT NO. 1.

[Filed July 20, 1880.]

[No. 10,438.]

THE PEOPLE OF THE STATE OF CALIFORNIA, RESPONDENT, vs. ANTOINE MORINE, APPELLANT.

DEPOSITIONS IN CRIMINAL ACTION. Depositions in a criminal action are not admissible, unless *certified* by the magistrate. The *jurat* is not a certificate. The latter should state that the deposition was read to the witness before signing, and must set forth an actual compliance with all the requirements of the statute.

Appeal from the District Court of the Tenth Judicial District, Colusa County.

Attorney-General, and ——— *Starr*, for respondent.
Geo. Blanchard, Jr., for appellant.

MCKINSTRY, J., delivered the opinion of the Court:

The first point of appellant's counsel is stated as follows: "The District Attorney offered in evidence a deposition, or what purported to be a deposition, consisting of what was claimed to be the testimony of A. J. Pitts, taken before a Justice of the Peace—the committing magistrate. The deposition was not certified by the magistrate, as required by Section 869 of the Penal Code, nor does it appear to have been taken in the presence of the defendant. The defendant objected to the deposition on several grounds, among others *that it was not taken in the presence of the defendant*, and that the deposition was not properly authenticated. The objection was overruled, and defendant excepted. The deposition was then read in evidence."

An examination of the transcript shows that the defendant's counsel is mistaken in supposing that an objection was taken to the deposition on the ground that "it was not taken in the presence of the defendant." The objection thus construed by counsel was:

"*Second.* That said deposition is incompetent for any purpose. Under our Constitution the Legislature has not the power to provide that any testimony shall be taken at the trial of a criminal case, except from the lips of the witness, and while the witness is on the stand confronting the defendant; that it is a matter of constitutional law that in every criminal case the defendant shall be confronted by his witness (meaning by the witnesses against him), and that the

taking of a deposition before the preliminary examining magistrate is not a compliance with that provision.

This is evidently not an objection that it had not been proved that defendant was present at the examination and when the deposition was taken, but an objection that such a deposition cannot be received at the trial *in any case*.

It is not necessary to inquire whether the provision of the Penal Code which authorizes a deposition taken before a committing magistrate to be read at the trial is constitutional. Section 686 of the Penal Code provides that a defendant shall be entitled to be confronted with the witnesses against him *in the presence of the Court*, except that where the charge has been preliminarily examined before a committing magistrate, and the testimony taken down by question and answer in the presence of the defendant, who has either in person or by counsel cross-examined, or had an opportunity to cross-examine, the witness, * * * the deposition of such witness may be read, upon its being satisfactorily shown to the Court that he * * * cannot with due dilligence be found within the State." And Section 869 of the Penal Code is as follows:

"The testimony given by each witness must be reduced to writing, as a deposition, by the magistrate, or under his direction, and authenticated in the following form:

"1. It must state the name of the witness, his place of residence, and his business or profession.

"2. It must contain the questions put to the witness, and his answers thereto, each answer being distinctly read to him as it is taken down, and being corrected or added to until it conforms to what he declares is the truth.

"3. If a question be objected to on either side and overruled, or the witness declines answering it, that fact, with the ground on which the question was overruled or the answer declined, must be stated.

"4. The deposition must be signed by the witness, or, if he refuse to sign it, his reason for refusing must be stated in writing as he gives it.

"5. It must be signed and *certified* by the magistrate."

There can be no doubt that the two sections are to be taken *in pari materia*. It is a deposition taken in manner and form and certified as required by Section 869, which is declared to be admissible at the trial by Section 686. The section last referred to does not permit any evidence of the testimony given by a witness at the preliminary examination, except the deposition duly certified.

The deposition offered was not *certified* by the magistrate.

The *jurat* is not a certificate. The Code of Civil Procedure does not in terms provide for the contents of a certificate to a deposition. Yet as long ago as *Williams* vs. *Chadbourne* (reported in 6 Cal. 559), it was held the certificate should state that the deposition was read to the witness before signing. "It must set forth an actual compliance with all the requirements of the statute."

Judgment and order reversed, and cause remanded for a new trial.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed July 21, 1880.]

[No. 6700.]

IN THE MATTER OF THE ESTATE OF DANIEL BOLAND, DECEASED.

PROBATE SALE. An order of sale of the Probate Court, made upon an unverified petition, is void for want of jurisdiction.

Appeal from the Probate Court of Sierra County.

J. W. Turner, *Thos. Rutledge*, and *Creed Haymond*, for appellant.

F. D. Soward, for respondent.

McKEE, J., delivered the opinion of the Court:

This is an appeal from an order of the Probate Court of Sierra County, authorizing the administratrix of the estate of D. Boland, deceased, to resell certain real property of the estate, which had been formerly sold by the administratrix, and confirmed to the appellant as purchaser.

It is objected that the appellant was in no way a party to the order directing a resale, and cannot therefore appeal. An appeal may be taken by any party aggrieved from an order of the Probate Court against or in favor of directing the partition, sale, or conveyance of real property. (Sections 969, 938, C. C. P.)

The appellant describes himself in his notice of appeal as "a purchaser who purchased and paid for the real estate of deceased, described in and confirmed to him by an order of the Probate Court made and entered December 9, 1878." Assuming that he is a party aggrieved by the order from which he appeals (*Adams* vs. *Wood*, 8 Cal. 306; *Dennis* vs. *T. M. W. Co.*, 10 Cal. 369), and that the order itself is appealable, we find nothing in the transcript to indicate upon

what the order was made, except it be the petition upon which the Court had acted in making the original order of sale. But the Probate Court had, on the 30th of December, 1878, vacated and annulled the decree of confirmation of the previous sale, the sale itself, of which the decree was confirmatory, and the order of sale upon which the sale had been made, upon the following grounds, as set forth in the annulling order, to-wit:

"That the petition praying for an order of sale of said real property filed herein August 30, 1878, *is not verified, and does not particularly describe, nor describe at all, the condition of the property sought to be sold.*

"That the condition of said property was not proved at the hearing had pursuant to said petition on October 5, 1878; and that the condition of said property is not set forth in the order of sale made herein October 5, 1878, nor in the decree confirming said sales of real property made herein December 9, 1878.

"Wherefore, by reason of the last above recited facts and the premises, it appears that all the said proceedings are void in this, that the Court never acquired jurisdiction."

Neither the appellant nor any one else complained of this annulling order or decree. No appeal from it was taken by any one purporting to have been aggrieved by it. It stands in full force, unappealed from and unreversed; and if the grounds upon which it was made be correct, there was nothing in the application for a sale of the real property of the intestate which authorized the Court to order a sale or a resale of the property.

On looking into the record as it has been brought before us on this appeal, we find that the administratrix in her petition, filed August 30, 1878, for an order of sale, described the real property of the estate as follows: "That the said inventory and appraisement on file contains a full description of all the real estate of which the intestate died seized, or in which he had any interest, or in which the said estate had acquired any interest; and your petitioner, for a description of said real estate, hereby refers to said inventory, and makes the same a part of this petition; and that the condition and value of the respective portions of real estate are described in the said appraisement heretofore referred to, and made part of this petition."

There is neither inventory nor appraisement annexed to, or in fact made parts of, the petition; but it appears, outside of the petition, by the record in the statement on this appeal; "That on the 8th day of October, 1877, said administratrix

made and duly returned an inventory and appraisement of all the estate of said deceased which had come to her possession and knowledge."

That from said inventory and appraisement it is made to appear that said deceased died possessed of the following real estate, to-wit:

Two and one-quarter interests in the Consolidated California Gold Mining Company, located at Table Rock, Sierra County, California, of the value of $506; also one parcel of mining ground, known as F. Descombe's claims, located on the west bank of the East Fork of Cañon Creek, Sierra County, California, and opposite the mouth of the South Fork of the aforesaid creek, of the value of $20; also one ditch heading, in the East Fork of Cañon Creek, and discharging in the above claims, of the value of $15; and one ditch heading in the South Fork of Cañon Creek, also discharging in the above mentioned claims, of the value of $15."

This is all of the inventory and appraisement. Of the property described therein, the Court ordered to be sold the following, as it is described in the decree of sale: "The following is the real estate hereby authorized to be sold, being situate in the county of Sierra, State of California, and described as follows, to-wit:

"Two and one-fourth (2¼) interests in the mining claims known as the Consolidated California Gold Mining Company's Claims, located on the south side of Table Rock, about one and a half miles from Howland Flats. Also one parcel of mining ground known as Frank Descombe's Mining Claims."

Taking the petition and inventory together, the description of the property, as was held in *Stuart* vs. *Allen*, 16 Cal. 317, is not so defective as to render the sale void. But while the description may be considered sufficient, there is nothing in the petition, or the inventory and appraisement referred to therein, which indicates the condition of the mining interests, or of the mining company in which such interests are held, or of the mining claims. It does not appear whether they were worked or lying idle, whether they were sources of profit or loss to the estate. The petitioner alleges that a sale of all the property described in the inventory was necessary, because the personal property of the estate was insufficient to pay debts, family allowance, and estimated expenses of the administration. And the petition shows that the amount of the personal property of the estate which came to the hands of the administratrix "is the sum of, in goods, $1,600," and that the debts, family allowance, and expenses

amount to $2,041. But if the mining interests or claims were yielding an income which was sufficient to make good the alleged deficiency in the personal estate, there would not have been any necessity for a sale of the real property. So long as there is a sufficiency of personal property in the hands of an administrator to pay the debts and expenses of an administration, a sale of the real property of an estate cannot be made. (*Haynes* vs. *Meeks*, 20 Cal. 288.) Hence the necessity for setting forth in the petition the condition and situation of the real property. Section 1530 of the Code of Civil Procedure provides "that the executor, administrator, or any heir at law or creditor of the estate, any partner or member of any mining company, in which interests or shares are held or owned by the estate, may file in the Probate Court a petition in writing setting forth the general facts of the estate, being then in due course of administration, and *particularly describing the mine, interests, or shares which it is desired to sell, and particularly the condition and situation of the mine or mining interests, or of the mining company in which such interests or shares are held*, and the grounds upon which the sale is asked to be made." And Section 1537 of the same Code, under which the petition in this case seems to have been filed, provides that "to obtain an order for the sale of real property, the executor or administrator must present a verified petition to the Probate Court, setting forth the amount of personal property that has come to his hands, and how much thereof, if any, remains undisposed of; the debts outstanding against the decedent, as far as can be ascertained or estimated; the amount due upon the family allowance; the debts, expenses, and charges of administration which have accrued or are likely to accrue; a general description of all the real property of which the decedent died seized, or in which he had any interest, and *the condition and value thereof*, and whether the same be community or separate property; the names of all the legatees and devisees, if any, and of the heirs of the decedent so far as known to the petitioner." Under either of these sections the petition under consideration was defective in failing to set forth the condition of the property. The Court, says the Supreme Court in *Estate of Smith*, 51 Cal. 566, "should be informed by the petition of the condition of the property—that is, whether the property is improved or unimproved, productive or unproductive, occupied or vacant, and the like. Such information is necessary to enable the Court to intelligently exercise its judgment in the selection of the property of the estate which can be most advantageously sold."

Brought, as this petition evidently was, under Section 1537, it is fatal to it that it was not verified. The verification of the petition, the description of the property, its condition, value, and character are jurisdictional facts which must affirmatively appear in a verified petition before a Probate Court can make any valid order for a sale of the real property of an estate to pay debts. These are of the essence of the petition, without which it has no legal existence. The petition is the commencement of a distinct proceeding in the nature of an action; without it the Court acquires no jurisdiction to order the sale, for the jurisdiction for that purpose depends upon the averments of such a petition. (*Fitch* vs. *Miller*, 20 Cal. 385; *Sprigg's Estate*, *Id.* 125.)

It has been repeatedly held that the jurisdiction of the Probate Court depends absolutely on the sufficiency of the petition—in other words, in its substantial compliance with the requirements of the probate law. (*Fitch* vs. *Miller*, *supra*; *Haynes* vs. *Meeks*, *supra*; *Prior* vs. *Downey*, 50 Cal. 388; *Estate of Smith*, *supra*.)

The appellant tacitly admits the validity of the order of the Probate Court in setting aside the sale and confirmation; for although all the rights which he claims as an alleged purchaser of the property depend upon the decree of sale and of confirmation, he took no appeal from the order of the Court disannulling them, and unless that order has been vacated and set aside, the original decrees had been restored, and the appellant is in no condition to require a conveyance; for those decrees no longer existing of record, there is nothing upon which his claim of right to the property can be enforced, or upon which this Court could direct, as he has requested, the execution of a conveyance. Nor does there appear anything in the record before us to sustain the order appealed from for a resale. The record contains the original unverified petition upon which the Court below acted in directing a sale of the property in the first instance. It does not appear that it was verified before making the second order for sale. If it was made upon an unverified petition, it would also, like the first, be void for want of jurisdiction.

The order of the Probate Court made and entered March 1, 1879, authorizing the administratrix of the estate to again sell the real property of the estate is reversed, without costs to either party, and the cause is remanded to the Superior Court of Sierra County for further proceedings, with leave to the administratrix to petition for a sale of the real property *de novo*.

We concur: McKinstry, J., Ross, J.

DEPARTMENT NO. 2.

[Filed July 21, 1880.]

[No. 6873.]

LOS ANGELES CITY WATER COMPANY, APPELLANT,

vs.

THE CITY OF LOS ANGELES, A MUNICIPAL CORPORATION, RESPONDENT.

CONTRACT WITH WATER COMPANY. A contract to supply water for domestic purposes cannot be extended to furnishing water for sprinkling streets. Plaintiff had no right to surplus water over and above that necessary for domestic purposes. All above that amount belonged to the defendant, who could appropriate it to its own use.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Thom & Ross and *Brunson & Wells*, for appellant.
J. F. Godfrey, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal from a judgment rendered in favor of the defendant in an action brought to recover $2,500 for water alleged to have been furnished by the plaintiff to the defendant for sprinkling its streets.

The defendant leased the Los Angeles Water Works to the plaintiff "for the sale or delivery of water to the inhabitants of said city for domestic purposes," upon certain conditions which it agreed to perform. The defendant agreed to lay down pipes of sufficient capacity to supply the inhabitants of the city with water for domestic purposes, and within two years after the date of the contract to erect such machinery in connection with the water works as would secure to the inhabitants of said city a constant supply of water for domestic purposes. The plaintiff further agreed to furnish water for the public schools, city hospitals, and jails free of charge. And said contract contained the following proviso and stipulation: "Provided always, that the rights and privileges by these presents conceded to said parties of the second part, do not embrace to any extent, or have any reference to the water works of said city used for the distribution of water for the purpose of irrigation, or to affect in any manner any rights of irrigation, either existing at present or which may exist hereafter, except as to the ten inches of water as hereinbefore provided. And it is expressly stipulated and covenanted that said parties of the second part

shall not dispose of any water for the purposes of irrigation, but shall only take from said river the water necessary for domestic purposes, as above specified."

Upon the points directly involved in this action the Court found:

"That defendant from the 1st day of May, 1877, to the 24th day of August, 1878, at various times had taken water from plaintiff's pipes, and had used the same without plaintiff's consent for sprinkling the streets of said city, and that during said time no water has been furnished by plaintiff or used by defendant for that purpose that was not indispensable to said city for sprinkling and watering said streets.

"That no price or rate has been fixed by the city of Los Angeles, or by any other party or persons, for the sale of said waters, save the rates fixed by the plaintiff itself and for its own benefit.

"That on the 1st day of March, 1877, the Council of the city of Los Angeles duly made and regularly passed a resolution providing that the Board of Health of said city should see that certain streets of said city should be properly sprinkled and kept free from dust; and that since the passage of said resolution, under the direction of said Board of Health, parties contracting with the city have sprinkled the streets of said city, without interference on the part of the plaintiff, until the 24th day of August, 1878.

"That at all times said plaintiff has had on hand of the waters of the Los Angeles River, without objection on the part of the defendant, water more than was sufficient to supply all the inhabitants of said city using the same for domestic purposes, and for the sprinkling of the streets, flushing the sewers, and watering the parks and plazas of said city, and to carry out said contract of 1868; and thereupon the agents of said city took and used the same as needed by said city and its inhabitants for sprinkling said streets.

"The defendant has from time to time, since the 1st day of May, 1877, taken and consumed of the said water from plaintiff's pipes, for the purpose of sprinkling the streets of said city, to the extent and of the value, according to the rates established by plaintiff, of two thousand two hundred and fifty dollars in United States gold coin."

As we interpret the contract of the parties, the plaintiff is only entitled to receive pay for water furnished to the inhabitants of Los Angeles for domestic purposes. The stipulation is not to dispose of any water for the purposes of irrigation, or to take from the river any more water than was required

for domestic purposes. From the findings of the Court it appears that the plaintiff did take more than was necessary for domestic purposes, and that the surplus was sufficient for sprinkling the streets. The plaintiff had no right to that surplus, much less any right to dispose of it. We think that all the water above the amount required by the inhabitants for domestic purposes belonged to the defendant, and that it had a right to appropriate it to its own use under the contract. Water taken for sprinkling the streets was water taken for purposes of irrigation, within the primary definition of that word; and the plaintiff expressly agreed not to dispose of any water for that purpose. The judgment of the Court below must be affirmed.

Judgment affirmed.

We concur: Myrick, J., Thornton, J.

DEPARTMENT NO. 1.

[Filed July 21, 1880.]

[No. 7152.]

ELLIE NELSON, RESPONDENT,

vs.

ELLEN McCLANAHAN, APPELLANT.

PROBATE OF WILL—PROOF OF INTENTION OF TESTATOR. Proof of objections made by deceased to names inserted in the rough draft of a will are part of the *res gestæ* to show that the will is in conformity with the will of the testator, is admissible for that purpose.

Appeal from the Probate Court of Colusa County.

J. D. Chadbourne and *Thomas Nicholls*, for respondent.
Hart & Hart, for appellant.

Ross, J., delivered the opinion of the Court:

Thomas M. McClanahan died June 26, 1879. For many years prior to the 5th of December, 1876, he had lived with Catherine McClanahan without being married to her, and had by her four children—Samuel, Ellie, Jackson, and Lettie. On the 5th of December, 1876, he married the said Catherine, and on the next day she died. On the 30th of December, 1876, Thomas M. McClanahan executed a document acknowledging each of said children as his own, and declaring them to be legitimate, and that his marriage with Catherine was consummated to make them so.

On the 26th of November, 1877, he married the defendant and appellant, Ellen McClanahan. September 21, 1878, he

made the will in controversy, by which one-half of his estate was given to the defendant Ellen, and one-half to his two children Jackson and Lettie. The defendant was nominated as executrix, and petitioned for the probate of the will. The daughter Ellie McClanahan, now Ellie Nelson, contested its probate mainly upon the grounds that her father, at the time of executing the alleged will, was not of sound and disposing mind, and that he signed it under duress, menace, undue influence, and fraud. Issues were framed upon these questions and submitted to a jury, before whom the case was tried. At the trial the contestant introduced a good deal of testimony tending to show that the deceased testator executed the instrument in question under undue influence. Upon the conclusion of the contestant's case, the proponent introduced, among other witnesses, Andrew Hallett, who, after testifying that in response to a message he attended the deceased for the purpose of drawing his will, said: "At that time I took a sheet of paper and pencil, and made a memorandum of what he wished to have done. I then went back to my office, two blocks distant, and made a rough sketch of a will, expressing in a rough way what I learned he wanted. I took it over to him and read it to him, and he objected to some portion of this rough outline as not being what he intended. Q. (by the proponent)—State what the portions were that he objected to? Ans.—In the rough sketch I made I inserted the names of four children. I am unable to say or recall to recollection how I learned the names of those four children—possibly from him and possibly from a former will. When I went over to see him the second time, I took the rough outline of this will and read it to him. He objected very positively to two of the names in the will which I had inserted there, and said he would not have those names in; that he would not give them anything. Those names were Samuel McClanahan and Ellie Nelson." The contestant thereupon moved the Court "that the evidence as to objections made by deceased, and the names given, be stricken out because not in the will, and they cannot be proven by parol." To which the proponent responded that the evidence "was offered as a part of the *res gestæ* to show that the will is in conformity with the will of the testator." The Court granted the motion, and struck the testimony out, proponent excepting.

In this ruling there was error. The declarations, if made, constituted a part of the *res gestæ*. If true, they certainly tended to show not only that the deceased was competent to make a will, but also that he was not acting under undue

influence. (1 Redfield on the Law of Wills, third edition, 553, 551, 542, and authorities there cited.) The credibility of the witness was a question for the jury, and the proponent undoubtedly had the right to have the testimony thus excluded submitted to them. The testimony was not offered, and of course was not admissible for the purpose of determining the construction or effect of the will. No such question was in issue, or could be considered in this proceeding. Nor was the error committed cured by the subsequent testimony of the witness.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McKinstry, J., McKee, J.

DEPARTMENT NO. 2.

[Filed July 21, 1880.]

[No. 6552.]

GEO. R. AMES, RESPONDENT,
vs.
A. ELDRED AND H. M. MITCHELL, SHERIFF OF THE COUNTY OF LOS ANGELES, APPELLANTS.

COMPLAINT. What is sufficient allegation of actual cash value of homestead.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

J. H. Blanchard, for respondent.

Thom & Ross and *C. N. Wilson*, for appellants.

MYRICK, J., delivered the opinion of the Court:

The only question in this case is as to the sufficiency of the declaration of homestead. Referring to the valuation of the premises, the declaration states "that the actual cash value is $5,000 *and over*." Section 1263, C. C., provides that the declaration *must* contain an estimate of the actual cash value.

To say that a piece of property is of the value of $5,000 and over, is not to give an estimate of the actual cash value; it is not to say whether the property is worth $5,001 or $50,000. (*Ashley* vs. *Olmstead*—opinion filed April 21, 1880.)

Judgment reversed and cause remanded, with directions to sustain the demurrer to the complaint.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 1.

[Filed July 20, 1880.]

[No. 6751.]

TIERY WRIGHT, APPELLANT,

vs.

THOMAS F. LANGENOUR, RESPONDENT.

ESTOPPEL. In a contest between plaintiff and defendant as to which is entitled to purchase from the State, the plaintiff is estopped to deny the authority of the Deputy Locating Agent to administer the oath required.

Appeal from the District Court of the Sixth Judicial District, Sacramento County.

Joe Hamilton and *C. P. Sprague*, for appellant.

N. C. Belcher and *W. B. Treadwell*, for respondent.

MCKINSTRY, J., delivered the opinion of the Court:

In an action to determine a contest arising in the Surveyor-General's or Register's office, each party must allege the facts which in his view would authorize the issue of a certificate to him. (*Christman* vs. *Brainard*, 51 Cal. 534.)

The plaintiff neither alleged in his complaint nor proved at the trial that he was a resident of the State of California, or that he was of lawful age, or that he had not entered any land in part satisfaction of the grant, *in lieu of sixteen or thirty-six sections*, which, together with that which he now seeks to purchase, exceeded three hundred and twenty acres. He was therefore not entitled to a judgment in the Court below.

The section of the Act of April 27, 1863, contains the following proviso: "Nothing in this Act shall be construed to affect the sale of lands by the location of *school land warrants*, which lands shall be located and paid for in the manner now provided by law."

Defendant's application is not invalid for want of the affidavits required by the Act referred to, since it comes within the proviso above quoted.

It is urged by the plaintiff and appellant that the application of respondent was invalid under the Act of 1858 (Stat. 1858, p. 248), inasmuch as certain affidavits were made before a person signing the *jurat* as "Deputy Locating Agent." The administration of an oath is a function ministerial in its nature; and the State Locating Agent, as a ministerial officer, had power to appoint deputies. (*Jobson* vs. *Fennell*, 35 Cal. 711.)

The plaintiff has no right in or to land unless it is property of the State; and as the contest is whether plaintiff or defendant, or either, is entitled to purchase from the State, the plaintiff is estopped from denying the authority of the Deputy Locating Agent. It is not necessary to decide that the State may not dispute it.

Judgment and order affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed July 20, 1880.]

[No. 6589.]

A. E. DICKENSON ET AL., RESPONDENTS,

vs.

A. BOLYER, APPELLANT.

LABORERS' LIEN. Construction of Section 1188 of Code of Civil Procedure

Appeal from the District Court of the Twenty-first Judicial District, Plumas County.

W. N. Kellogg, for respondents.

J. D. Goodwin, for appellant.

Ross, J., delivered the opinion of the Court:

The plaintiffs performed certain work for the defendant Bolyer upon a dwelling-house situated on a certain mining claim, and also in and upon a tunnel and other portions of the mining claim. For the amount due for the work so performed the plaintiffs filed, in due time, their claim of lien, and brought the present action to enforce it. The defendants Thompson and Kellogg, to whom Bolyer executed a mortgage upon the premises after the filing of the laborers' claim of lien, appeal from the judgment of the Court below foreclosing the latter, on the ground that inasmuch as the claim of lien filed by the plaintiffs did not designate the amount and value of the work performed upon the dwelling-house, and the amount and value of that performed upon the tunnel and other portions of the mining claim, the lien of the plaintiffs should have been postponed to appellant's mortgage, by virtue of Section 1188 of the Code of Civil Procedure, which reads as follows: "In every case in which one claim is filed against two or more buildings, mining claims, or other improvements owned by the same person, the person filing such claim must at the same time designate the amount

due to him on each of such buildings, mining claims, or other improvements; otherwise the lien of such claim is postponed to other liens. The lien of such claimant does not extend beyond the amount designated, as against other creditors having liens, by judgment, mortgage, or otherwise, upon either of such buildings or other improvements, or upon the land upon which the same are situated."

We think appellants do not correctly construe this section. It plainly applies only to cases in which one claim is filed against two or more *separate and distinct* "buildings, mining claims, or other improvements owned by the same person," and not to a case where, as here, all of the work was performed upon one and the same piece of property, although upon different portions of it.

Judgment and order affirmed.

We concur: McKinstry, J., McKee, J.

DEPARTMENT NO. 1.

[Filed July 23, 1880.]

[No. 7202.]

HENRY C. BERRYMAN, APPLICANT,

vs.

GEO. C. PERKINS, GOVERNOR OF THE STATE OF CALIFORNIA, RESPONDENT.

MANDAMUS. This is the proper remedy to compel the Governor to approve the valuation of property sought to be condemned under the Act of 1875–6 (Statutes, p. 316), to provide for a supply of water for the University, and for the Asylum for the Deaf, Dumb, and Blind.

Wm. M. Pierson and *W. W. Cope*, for applicant.
Attorney-General Hart, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The fourth section of the Act of April 1, 1876, "to provide for a supply of water for the University, and for the Asylum for the Deaf, Dumb, and Blind" (Stats. 1875–6, p. 316), authorizes the Controller to draw his warrants for the appraised value of property sought to be condemned, "upon a judgment being rendered for the condemnation of said springs and lands and right of way and appraising the value thereof, *and upon the filing in said proceeding of a written certificate of the Governor approving such valuation.*"

The statute requires, as conditions precedent to the taking of the land and water for public uses, not only that the land

shall be appraised by the Superior Court, a jury, or commissioners, but also that such appraisal shall be approved by the Governor. Until he shall concur with the appraisal, the condemnation cannot be made operative. This necessarily involves an inquiry and ascertainment of the actual value of the property, and the employment of judgment and discretion on the part of the Governor. The power to determine whether the appraisal is correct is his; and we cannot deprive him of his descretion, or adjudicate the value for him. In all matters resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie to control the discretion, or determine the decision which is to be made. (High's Ex. Rem., 42; Moses on Mandamus, 82; *Harpending* vs. *Haight*, 39 Cal. 208.)

It is not necessary to decide whether the Governor might be compelled to make inquiry in respect to the value of the property, if it should be made to appear that he had refused to make such inquiry. The application here is that he be compelled to issue his certificate *approving* the valuation.

We concur: Ross, J., Thornton, J.

(By agreement between McKee, Justice, and Thornton, Justice, the latter acted for the former in this case.)

DEPARTMENT NO. 2.

[Filed July 19, 1880.]

[No. 6470.]

CITY AND COUNTY OF SAN FRANCISCO, APPELLANT,
vs.
SPRING VALLEY WATER WORKS, RESPONDENT.

(See page 650 of this volume of the LAW JOURNAL.)

Appeal from the District Court of the Fourth Judicial District, San Francisco County.

Judge Nathaniel Bennett and *John P. Bell*, for appellant.
Fox & Kellogg, for respondent.

By the Court:

Upon the authority of the *City and County of San Francisco* vs. *The S. V. W. Works*, No. 6471, opinion filed June 22, 1880:

Judgment reversed, and cause remanded to the Superior Court of the city and county of San Francisco, with directions to overrule the demurrer to the complaint, with leave to the defendant to answer within the time usually allowed.

Legal Facetiæ.

THAT was a triumphal appeal of the lover of antiquity who, in in arguing the superiority of old architecture over the new, said: "Where will you find any modern building that has lasted so long as the ancient?"

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A PRISONER was arraigned for some offense against the criminal laws of the State, who stated he was unable to have a lawyer. The Court told him to select one of a number of young lawyers present to represent him. He contemptuously surveyed the group of legal tyros, and remarked that he preferred to plead guilty at once than be embarrassed with such counsel. This provoked a ripple of laughter from the bystanders at the expense of the ignored lawyers. The Court gave the prisoner the full term. Thereupon the lawyers laughed, and "honors were easy."

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HAD HEARD OF IT.—A short time since this community was shocked by the sudden death of the eminent Judge D——. The loss was deeply felt by members of the bar and citizens generally. One of our most promising young legal lights, Mr. W———, was condoling with another member of the bar, Mr. B———, lamenting the loss of the distinguished jurist, and remarked in conversation that he had a long brief prepared to present the Judge upon the day of his sudden demise. He was somewhat surprised when his friend innocently suggested that "no doubt Judge D——— had heard of it."

***

A NON-PLUSSED JUDGE.—An Irishman sold his farm and bought another in the same neighborhood, and in moving he took the manure from his old farm to enrich his new one; and the purchaser sued him for so doing. Upon the trial, the Judge instructed the jury that, according to the law, "*manure is a part of the real estate,*" and that they must, therefore, give a verdict in favor of the plaintiff for the value of the manure. This so exasperated Pat that he jumped up and addressed the Court in an excited manner as follows:

"Do you say, Judge, that manure is a part of the real estate?"

"Certainly," replied the Judge, "as much so as the soil."

"Now, Judge, is not a cow personal property?" "Yes," said the Judge.

"And is not hay personal property?" "Yes."

"Well, now, thin, Judge, will you please explain to the jury how one piece of personal property can go through another piece of personal property, and come out real estate?"

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TO SUBSCRIBERS.

Subscribers are hereby notified that between this time and August 21st—the end of Volume V—we shall forward all accounts due the PACIFIC COAST LAW JOURNAL through Wells, Fargo & Co. for collection. After that date the JOURNAL will not be sent to delinquents of one year's standing until the *old accounts are paid up*. The subscription price of the JOURNAL is $6.50 per year, or $3.50 for six months, payable IN ADVANCE. This mode of collection is a matter of convenience to us, and applies to all bills.

Current Topics.

WITH this number we close Volume V of this journal. Our next number will contain the index. After the first issue of the new volume (VI) we will be prepared to exchange bound volumes for the unbound numbers of Volume V, provided they are all in perfect condition, upon the payment of $1.00—the cost of binding—and payment of transportation. Missing numbers will be charged for at the rate of 12½ cents per copy.

We cannot allow this opportuny to pass without expressing our thanks to the legal fraternity in general for their good will and support. We propose to make this journal a necessity, and have nearly completed extensive arrangements for enlarging its pages, so as to bring down current decisions and legal information to the date of issue. In addition to California decisions published in full, we intend to publish all other important decisions rendered on this coast, and an abstract of decisions rendered elsewhere. We look to our

brethren in the law to co-operate with us in our efforts to keep our promises, by prompt payment of their subscriptions, and the fulfillment of their promises on our behalf. The numerous and important cases likely to come up in our different courts require our constant attention. In this we could be aided by the bar if points were given us for current topics, etc. · Constitutional questions, and those arising under the subject of conflict of laws, are of the greatest importance; and as our journal extends to the Eastern States, our subscribers there naturally desire these questions to be fully treated.

IN our issue of July 24th, No. 22, in publishing the case of *San Francisco* vs. *Spring Valley Water Works*, we inadvertently omitted the name of Judge NATHANIEL BENNETT as counsel for appellant. It appears that it was upon the brief of Judge BENNETT that the Supreme Court reversed the decision of the Court below. We never fail to give due credit where credit is due. To say the least, errors will creep in unawares, following the natural fallibility of human affairs. We hope that our attention will be called to any errors that may appear in our journal, so that proper corrections may be made.

IN a recent English case (*Hinchcliffe* vs. *Barwich*, Court of Appeal), where, at a sale by auction of a horse warranted a good worker, one of the conditions of sale was that any horse not answering a warranty must be returned by 5 o'clock on the day after the sale, to be tried by a competent person appointed by the proprietors of the repository where the sale took place, whose decision should be final, it was held that no action could, in the absence of fraud, be brought by the purchaser for breach of warranty, the horse not having been returned on the day after the sale.

AN interesting decision by Judge SULLIVAN, of the Superior Court, Department 2, will be found in this issue. The case is that of *John H. Burke* vs. *James C. Flood et al.*

Supreme Court of California.

DEPARTMENT NO. 2.

[Filed July 22, 1880.]

[No. 6532.]

H. D. BARROWS ET AL., RESPONDENTS,

VS.

C. L. KNIGHT ET AL., APPELLANTS.

MECHANICS' LIEN. Plaintiff cannot acquire a lien upon a building for the value of articles taken upon the premises by somebody after the completion of the building. Under contract to furnish hardware, the plaintiffs could acquire a right of lien upon the building for the materials actually used in its construction.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Glassell, Chapman & Smiths, for respondents.
Thom & Ross, for appellants.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an action to foreclose a mechanics' lien upon a house and lot. Judgment was rendered and entered for the plaintiffs. J. De Barth Shorb and two other defendants moved for a new trial, which was denied. From the judgment and order denying a new trial defendant Shorb has appealed to this Court.

The Court found among others the following facts:

"On the 9th day of October, 1876, the plaintiffs, as such partners, at the special instance and request of the defendant C. A. Knight commenced, and from time to time, up to and including the 3d day of January, 1877, continued to furnish materials to be used in, and to perform labor, upon the construction of that certain frame dwelling-house erected and now being upon the parcel of land described in the complaint, situated in the county of Los Angeles; and all the materials so furnished were actually used in the construction of said building, except two bolts of the value of $3.50, which were not used in such construction, but were furnished to be so used on January 3, 1877."

"On or before the said 9th day of October, 1876, the said defendant C. A. Knight, through the defendant Albert Knight, who was his father and agent, entered into a contract with plaintiffs, by the terms of which plaintiffs agreed

to furnish such materials to be used in, and to perform such labor upon, the construction of said building as should from time to time be demanded; and pursuant to such contract plaintiffs performed the labor and furnished the materials referred to in the last finding."

"Said contract was completed by plaintiffs on the 3d day of January, 1877, and not before; and within sixty days thereafter—to-wit, upon the 2d day of March, 1877—plaintiffs duly filed with the County Recorder of Los Angeles County their claim, duly verified by the oath of the plaintiff W. C. Furrey, containing a statement of plaintiffs' said demands, after deducting all just offsets and credits, with the name of the reputed owner, C. A. Knight, and the names of said Albert Knight and J. De Barth Shorb, as having or claiming some interest in said lands, and also the name of the person by whom they were employed and to whom they furnished said materials—to-wit, said C. A. Knight—with a statement of the terms, time given, and conditions of their said contract, and also a description of the said property sought to be charged with the lien, sufficient for identification."

It appears by the evidence that the plaintiffs are hardware merchants, and that in the months of October, November, and December, 1876, they furnished various articles of hardware to the defendants Knights, father and son, to be used in the construction of the house upon which they seek in this action to enforce a lien. The understanding was, that the house was being built for the son; and the articles furnished by plaintiffs were charged to him, although the father ordered some of them. The only articles which the plaintiffs claim to have furnished after December 28, 1876, are two door bolts, which the Court finds were not used in the construction of the building. One of the plaintiffs testified that these were ordered by Albert Knight a few "days previous to the 12th of December," 1876. If the plaintiffs can be regarded as contractors, and their contract was not completed until these bolts were furnished, then their claim of lien was filed for record within sixty days after the completion of their contract. Otherwise their claim was filed too late. The reason for the delay in furnishing the bolts was, that the plaintiffs did not have them when they were called for in the early part of December, 1876, nor until they had procured them from San Francisco. That the bolts which the plaintiffs furnished were taken by somebody to the premises of the Knights is quite clear; but it does not appear to whom they were delivered, or how they came to be upon said prem-

ises. There is no claim that they were delivered to any person before the 3d of January, 1877, and there is no evidence as to whom they were then or afterwards delivered. One Ballard testified that he worked upon the building as a carpenter, and that he obtained the bolts for it of Foster, Howard & Co., on the 11th of December, 1876, and put them on the door, and that the house was finished as early as the 20th of December, 1876. C. A. Knight, one of the defendants, testified that the house was finished on the 18th day of December, 1876, and that no work was done on it to his knowledge after that date. He further testified as follows: "Sometime before the house was finished, I ordered two front door bolts at Barrows & Furrey (plaintiffs), but they were so long in delivering them that we were obliged to get another set, which were put on the doors. The pair from Barrows & Furrey were not used, and were in the house when I left San Gabriel. I sent the bolts to Barrows & Furrey, but they refused to take them back."

It does not seem to us that the plaintiffs acquired any right to a lien upon the building for the value of these bolts taken upon the premises by somebody after the completion of the building. The plaintiffs had never entered into any contract to furnish to the defendants, nor had the defendants agreed to procure from the plaintiffs, all the hardware which might be required for the construction of the building. The defendants did procure some of it from the plaintiffs, and some of it elsewhere. There is no evidence tending to prove that the defendants agreed to wait for the bolts until the plaintiffs could procure them, and we are unable to discover that they were under any obligation to do so. The only contract between the parties was that defendants pay for what they procured of plaintiffs. Under the most favorable construction which we can put upon the law relating to mechanics' liens, the plaintiffs could only acquire under such a contract a right of lien upon the building for the materials actually used in its construction. We are not all of us prepared to go so far as that at present. But we all agree that the claim of lien was not filed within the time limited by law for filing it, and that the Court erred in denying the defendants' motion for a new trial. The appeal from the judgment must be dismissed, on the ground that it was not taken within one year from the entry of the judgment. But the defendants' motion for a new trial should have been granted.

Order denying defendants' motion for a new trial reversed, and cause remanded for a new trial.

We concur: Myrick, J., Thornton, J.

DEPARTMENT NO. 2.

[Filed July 21, 1880.]

[No. 6487.]

IN THE MATTER OF THE ESTATE AND GUARDIANSHIP OF LEONORA CARDWELL, A MINOR.

GUARDIAN AND WARD. This cause was remanded, with instructions to remodel the settlement of the account by computing interest at the statutory rates, compounding annually instead of one per cent. per month.

Appeal from the Probate Court of Los Angeles County.

Bicknell & White, for appellant.
Thom & Ross, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an appeal by the guardian from an order of the Probate Court settling his final account, disallowing certain items which he sought to have placed to his credit, and charging him with interest on certain sums. The facts are stated in the findings, from which we gather the following:

On the 11th of October, 1866, the guardian was appointed, and he remained such until his ward attained majority, September —, 1877. From time to time during the guardianship he received various sums of money and certain real estate, the property of his ward. January 8, 1875, he had $5,000 in his hands belonging to his ward. On that day one Pleasants was desirous of purchasing from one Ramirez a tract of land known as the Ramirez Place, and applied to the guardian for a loan of $5,000 to make the purchase. Pleasants made the purchase, and the guardian on the said day loaned to him the $5,000 belonging to the ward, taking the promissory note of Pleasants. As security for the loan, the guardian, on the first of February, 1875, took in his own name, with the consent of Pleasants, a deed of the land from Ramirez, the understanding being that when Pleasants should pay the amount so loaned, with interest, he was to have a conveyance of the land. The land was at that time worth only $5,000. Shortly afterwards Pleasants agreed to sell to Reavis one-third interest in said land, and the guardian agreed that upon payment of said sum of $5,000 and interest he would convey the land—two-thirds to Pleasant and one-third to Reavis. January 20, 1877, there was due on the note $5,000 principal and $762.50 interest; on which day the guardian,

in payment of said sums, took from said Pleasants (who was then insolvent) and from Reavis, in his individual name, a deed of all their right, title, and interest in the Ramirez Place, and from Reavis a deed of lot 3, block 27, lot 16, block 22, and lots 3 and 4, block 25, East Los Angeles, and canceled and surrendered the note to Pleasants. The Ramirez Place and the East Los Angeles lots the guardian, in rendering his final account, proposed to surrender and turn over to said Leonora in lieu of the aforesaid money. The guardian never had any authority from the Probate Court to make the loan or purchase the property, or to surrender the note, or to make any of said transactions.

On the 3d of March, 1872, said guardian had the other sum of $1,500 belonging to his said ward, and $1,500 belonging to a brother of Leonora's, also under the same guardianship, and loaned both sums to one Beane, taking his promissory note therefor with interest at the rate of 1¼ per cent. per month, secured by mortgage on one-half of a lot on Commercial Street in Los Angeles (said one-half being then worth $1,600), and a chattel mortgage of a half interest in a printing establishment (said half interest being then worth $1,000). On the 12th of December, 1872, there was due on the note from Beane, for principal $3,000, and for interest $337.50; and Beane being insolvent, the guardian took from him a conveyance of the real estate and personal property mortgaged, and canceled and surrendered the note. The interest thus acquired in said lot the guardian proposed to have turned over to said Leonora in lieu of the said $1,500. The guardian had no authorization from the Probate Court to make any of these transactions.

The guardian made some other loans and took notes therefor, which notes, it was stipulated on the trial, the guardian would retain and be charged with the amounts thereof.

The said loans and all of said transactions were made, received, and had in good faith on the part of the guardian; the conveyances to him were received on the advice of counsel; and the guardian had no intent to acquire any title or advantage to himself. The loans, however, were made (as the Court found) upon inadequate security, and were not such as a prudent business man would have made. At all times since February, 1872, the guardian could have loaned the money on good security upon interest at the rate of one per cent. per month. At various times since the purchases, the guardian received rents from the Remirez property $93, and from the Beane lot $385, and sold the printing establishment for $1,617.50, which items he has charged to himself;

and has paid $288.56 taxes on said real estate, which he has placed to his credit. He has tendered to said Leonora a proper deed of said real estate. On the other hand, said Leonora offered a deed to the guardian of the real estate.

On the 10th of February, 1876, the guardian rendered a full account and report of his proceedings, including the transactions above referred to, which were then completed—viz., the loan to Beane and the deed from him—charging the ward therewith, and the loan to Pleasants. After due notice and a full hearing, April 19, 1876, the account was settled and allowed as rendered, and a decree made to that effect, which has never been reversed, modified, or set aside, nor has any motion been made to that end.

The findings also embrace transactions not involved in the questions on this appeal. On these findings the conclusions of law at which the Court arrived were, in substance:

That the loans to Pleasants and Beane were made on inadequate security and improvidently; that the purchases were without authority, and not binding on said Leonora; that the guardian should be charged with said sums of $5,000 and $1,500, with interest thereon at the rate of one per cent. per month; that the sums of $478 rents, and $1,617.50 received on sale of the printing establishment, should be eliminated from the account; that he should be charged with the $288.56, amount paid for taxes on said real estate, and that judgment should be rendered accordingly.

A decree was made to that end, and from that decree the guardian has appealed. The points made on the appeal are:

1. The guardian had power to invest moneys of his ward without an order of Court.

2. The decree of the Probate Court of April 19, 1876, settling and allowing the guardian's account, is conclusive upon the respondent.

3. The Court erred in allowing the respondent interest at one per cent. per cent. per month on the moneys loaned to Beane and Pleasants.

First. It is true that a guardian has power to invest moneys of his ward without an order of Court; but if he do so, it may generally be said that he does it at his own risk. The statute is, that he "must manage the estate of his ward frugally and without waste." The Court found that the loans were, in the first instance, made upon inadequate security. That cannot be said to be frugal management. If an opportunity for investment present itself to a guardian, the statute is plain and direct as to the mode by which he will be protected—viz., Section 1792, C. C. P.—by which the Probate

Court, on application by the guardian or any other person interested, may authorize and require the guardian to invest the ward's money in real estate or any other manner beneficial, and may give such directions as may be needful for the management, investment, and disposition of the estate. An order for investment or other management thus obtained would protect the guardian, even if misfortune were to follow; but where he acts upon his own judgment, he is held to a more strict accountability. This rule may at first seem harsh, but a knowledge of the reasons for it will at once exhibit its correctness. The ward has no voice; the moneys *belong* to her, but she cannot be authoritatively heard; the Court, the especial protector of wards, is not consulted; the guardian in this case honestly, but imprudently, loans upon inadequate security; the property being money, which could be readily loaned at interest on good security, is loaned in such a way that but one result would naturally follow—viz., the taking of real estate not worth its price.

Second. It naturally follows that where there has been no order for investment or loan, the settlement of the account rendered subsequent to the transaction is not conclusive upon the right of respondent to question the propriety of the guardian's acts.

Section 1789, C. C. P., provides that all the *proceedings* as to accounting and the settlement of accounts of guardians must be had and made as required concerning estates of deceased persons; but this does not make Section 1738, C. C. P., as to the *conclusiveness* of the settlement of administrators' accounts, applicable to guardians' accounts. The Code does not in terms provide that the settlement of a guardian's intermediate account shall be conclusive. It may therefore be said to be merely *prima facie* evidence of its correctness, subject to be inquired into.

The effect of the decree appealed from is to let the guardian keep the real estate which he purchased, and account to the ward for her money. If the real estate can be made to yield the proper amount, he is secure; if it fail to do so, he receives the result of his own judgment as to the wisdom of the transaction, which is not only legal but moral justice.

Third. The Court found that the guardian could have loaned the money at one per cent. per month, and so charged him with that rate of interest. If he had loaned it at the statutory rate, he would have been justified. He had the right to determine for himself whether he would loan at the latter rate, or take the risk of loaning at the increased rate. Where a guardian *acts in good faith*, does not make any use

for himself of the funds, and makes no profit to himself, the law does not fix a penalty in the nature of "smart money," but charges him with the statutory rate of interest only. The Court erred in fixing the rate of interest higher than that. It does not appear that the property purchased has yielded or will yield any profit, or that it will repay the principal.

The cause is remanded to the Superior Court of Los Angeles County, with instructions to remodel the settlement of the account by computing interest at the statutory rates, compounding annually; and in all other respects the order should be affirmed. So ordered.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 1.

[Filed July 26, 1880.]

[No. 6533.]

A. LOTHIAU & CO., APPELLANTS,

vs.

H. J. WOOD AND THE SOUTHERN DISTRICT AGRICULTURAL SOCIETY, RESPONDENTS.

NOTICE TO CORPORATION—MECHANICS' LIEN. The personal knowledge by the director of the Agricultural Society of the erection of the improvements by the defendant Wood upon the land of the Society is not the knowledge of the Society. It did not therefore permit the improvements to be constructed upon its land, so as to make it liable for their construction under the provisions of the Mechanics' Lien Law.

FIXTURES. It is doubtful whether so-called buildings, consisting of dancing hall, swings, and seats, are fixtures within the meaning of the Mechanics' Lien Law, for which the Society would be chargeable even with notice. Neither swings nor seats are buildings or structures for which a lien may be filed.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Barclay & Wilson, for appellants.
O'Melveny & Trantum, for respondents.

McKEE, J., delivered the opinion of the Court:

Defendant Wood being a tenant of his co-defendant, the Southern District Agricultural Society, and in possession of the fair grounds and park of the Society, which were located on the N. W. ¼ of Section 7, Township 2 south, Range 12

west, S. B. M., in Los Angeles County, caused to be constructed thereon a dancing hall, swings, and seats; and the lumber and materials which were used in their construction he procured from the plaintiffs. On the 22d May, 1878, the lumber and materials were all furnished. Wood failed to pay for them; and on the 20th June, 1878, plaintiffs filed a mechanics' lien on the land and improvements, or "such interest as the defendant Wood had in them on the 1st day of April, 1868." To foreclose this lien, plaintiffs brought the action in hand against Wood and the Society, in which they sought to make the Society chargeable with the lien upon the ground that it knew of the construction of the "buildings," and did not give notice, according to Section 1192 of the Code of Civil Procedure, that it would not be responsible for their construction.

On the trial of the case the Court found, in substance, that the Society was the owner of the land; that Wood was in possession of it as lessee and tenant of the Society; that he caused to be constructed upon the land the dance-house, swings, and seats, for his own use and convenience; that he owed the plaintiffs a balance of $384.50 for the lumber and materials which were furnished and used in their construction, and that the owner of the land had no knowledge or notice of their construction. This last finding of fact is complained of as erroneous, on the ground that it is against the uncontradicted evidence in the case.

The record discloses that there was no conflict of evidence upon the subject, and that the whole evidence amounted to this—viz., that on one occasion one of the directors of the Society was present on the land while Wood was erecting the buildings. The precise time when the director was present does not appear. It may have been when Wood was constructing the swings or the seats, and it is doubtful whether he would be bound to take notice of anything more than what was being done while he was present. But, however that may be, there is no evidence tending to show that he was acting as the special agent of the Society when he saw the construction of any or all of the improvements upon the land of the Society, or that he had any management or control of its business other than as a director. Nor does it appear that he communicated any knowledge which he may have obtained from his visit to the land to the Society, or any of its agents. The director was, it is true, an agent of the Society. As such, the knowledge of a fact which concerns the business or affairs of the Society, acquired while engaged in the discharge of official duties, or of a matter

which had been specially intrusted to him, would be considered in law the knowledge of the Society; for a corporation can have knowledge only from its agents or records. But unless it was acquired by an agent in the management and conduct of its business, notice of it is not attributable to the corporation. If the agent acquires his knowledge casually, or privately, or by rumor, and he does not inform the corporation or its agents of it, the corporation is not chargeable with it. "I agree," says Chief Justice Nelson, in *The Bank of U. S.* vs. *Davis*, 2 Hill, 451, "that notice to a director, or knowledge derived by him while not engaged officially in the business of the bank, cannot and should not operate to the prejudice of the latter. This is clear from the ground and reason upon which the doctrine of notice to the principal through the agent rests. The principal is chargeable with this knowledge for the reason that the agent is substituted in his place, and represents him in the particular transaction; and as this relation, strictly speaking, exists only while the agent is acting in the business thus delegated to him, it is proper to limit it to such occasions." (See also *Fulton Bank* vs. *N. Y. and Sharon Canal Co.*, 4 Paige, 127.)

So where a defective deed had been recorded purporting to convey certain land, and one of the directors of a corporation which had acquired an equity of redemption in the premises, not acting as agent of the corporation, and having no management of its business otherwise than as a director, went to the town records for the purpose of ascertaining the situation of the land, and there saw the record of the deed, but did not inform the corporation or any of its agents thereof, the Supreme Court of Connecticut held that the corporation was not, by reason of these facts, chargeable with knowledge of the deed. (*Farrel Foundry Co.* vs. *Dart*, 26 Conn. 376.) It follows, therefore, that the personal knowledge acquired by the director of the Agricultural Society—the defendant in this case—of the erection of the improvements by the defendant Wood upon the land of the Society is not the knowledge of the Society. It did not therefore knowingly permit the improvements to be constructed upon its land, so as to make it liable for their construction under the provisions of the Mechanics' Lien Law.

Besides, it is doubtful whether all of the so-called buildings, consisting, as already stated, of a dancing hall, swings, and seats, are fixtures within the meaning of the Mechanics' Lien Law, for which the Society would be chargeable even with notice. The dancing hall was a covered structure resting on sills, partly weather-boarded around the sides, and

without doors or windows. Each of the swings consisted of two upright posts set in the ground and braced, and were connected at the top by a cross-piece with rings in it. Whether the "seats" were chairs, benches, stools, or the like, does not appear from the evidence; nor does it appear how much of the lumber and materials were used in the construction of any of them; nor is it designated in the asserted lien itself how much of the amount due to the plaintiff for lumber and materials which they furnished was chargeable against any one of the improvements, as is required by Section 1188 of the Mechanics' Lien Law. It was therefore impossible for the Court below to find the amount due to the plaintiffs on each of the improvements so as to give a judgment of lien upon any one of them as distinct from the others.

Moreover, whatever may be said of the dancing hall, we think that neither swings nor seats are buildings or structures within the intent and meaning of Sections 1183 and 1192 of the Code of Civil Procedure for which a lien may be filed, and the owner of the land who may acquiesce in their construction be made liable therefor. So far as the defendant the Agricultural Society is concerned, there is no error in the judgment of the Court below. But it is otherwise as to defendant Wood; for he had failed to answer the plaintiffs' complaint, and his default for not answering was duly entered. The plaintiffs were therefore in Court with their cause of action against him uncontested and admitted. And the Court found that he was in possession of the land as lessee and tenant of the Agricultural Society; and when in addition to this the plaintiffs proved the quantity of the land which was required for the convenient use and occupation of the improvements which had been constructed thereon, they were entitled to a judgment of foreclosure against Wood upon the interest which he had in the land.

The decision and judgment that the plaintiffs were entitled to a vendor's lien upon the improvements were entirely outside of any issues made in the case, and were against law.

The judgment in favor of the defendant the Agricultural Society is affirmed; and the judgment in favor of the plaintiffs against defendant Wood is reversed, with instructions to the Court below to enter up judgment upon the finding in favor of plaintiffs for a lien upon such interest as defendant Wood may have had in the land on the 1st day of April, 1878.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed July 19, 1880.]

[No. 6344.]

S. CHANDLER, RESPONDENT.

vs.

G. S. CHANDLER, APPELLANT.

EQUITY—DEED—QUIETING TITLE. Plaintiff cannot come into a court of equity and ask for a decree debarring defendant from asserting any claim under an instrument delivered by plaintiff in consideration of two thousand dollars paid him by defendant, without restoring the money.

POWER OF A COURT OF EQUITY. A court of equity has power to settle and determine the actual rights of the parties (and prevent future complications) by decreeing a formal conveyance of the fee from plaintiff to defendant, and a reconveyance for the life of the former by the latter.

Appeal from the District Court of the Sixth Judicial District, Yolo County.

S. G. Haryier, for respondent.
Geo. Cadwalader, for appellant.

McKINSTRY, J., delivered the opinion of the Court:

The plaintiff prays for a decree quieting his title to certain lands, and that defendant has no claim or title thereto. Defendant relies upon an instrument hereinafter recited, which was executed and delivered by plaintiff in consideration of two thousand dollars paid him by defendant. It is perfectly obvious that plaintiff cannot come into a court of equity and ask for a decree debarring defendant from asserting any claim under the instrument without restoring the money.

But defendant has set forth the nature of his claim, and is entitled to have his rights adjudicated. The decision of this case, therefore, must turn upon the construction of the instrument following:

"This indenture, made the fifth day of October, in the year of our Lord one thousand eight hundred and sixty-nine, between Solomon Chandler and Naomi Chandler, his wife, of the County of Yolo and State of California, parties of the first part, and Gates S. Chandler, the party of the second part, witnesseth that the said parties of the first part, for and in consideration of the sum of two thousand dollars, in gold coin of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold,

aliened, remised, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all that certain lot, piece, or parcel of land situate, lying, and being in the County of Yolo and State of California, and bounded and particularly described as follows, to-wit: The north half of the south-east quarter of Section thirty (30), and the north half of the southwest quarter of Section twenty-nine (29), all in Township nine (9) north, Range two (2) east, Mt. Diablo Base and Meridian, containing one hundred and sixty acres.

"*Provided always, and this indenture is made upon the express condition that the said parties of the first part shall have and retain the entire use and control of said demised premises, so long as they, or either of them, shall live, and anything in this indenture to the contrary thereof in anywise notwithstanding.* Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, homestead, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever. And the said parties of the first part, and their heirs, the said premises, in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against the said parties of the first part and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

"In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

"SOLOMON CHANDLER. [Seal.]
"NAOMI CHANDLER. [Seal.]

"Signed, sealed, and delivered in the presence of C. S. Frost."

It may be assumed that the deed is inoperative as a common law conveyance of the legal title, because an attempt to create or convey a freehold to commence *in futuro*. (*Hawes* vs. *Stebbins*, 49 Cal. 369.) If it be also assumed that the

English Statutes of Uses was part of our law prior to the Codes, the deed could not operate as a *covenant to stand seized to uses*, because the only consideration for such covenant was blood or marriage. (2 Black. Comm. 338.) Whether the statute, 27 Henry VIII., Ch. 10, is a portion of our law or not, it is quite certain that the Statute of Enrollments (27 Henry VIII., Ch. 16) has never been in force in this State, because its provisions are in conflict with our system of laws and with specific statutes; and the common law of England has been adopted "as a rule of decisions" only so far as it is not repugnant to the laws of this State. (Political Code, Sec. 4468.) If the Statute of Uses was part of our law, one could have covenanted to stand seized, or bargain and sell, to the use of another at a future day. (4 Kent's Comm. 298.) Chancellor Walworth, in the Court for the Correction of Errors, in an opinion, "the reasoning of which," says Professor Washburn (3 Real Property, 325), "would seem to leave little doubt in the matter beyond what arises from the circumstance that other Courts have taken a different view of the law," shows that a freehold *in futuro* could be created by a bargain and sale operating under the Statute of Uses. (*Rogers* vs. *Eagle Fire Company of New York*, 9 Wend. 621.)

If the Statute of Uses was not in force in this State when the deed was executed, the bargain and sale will be recognized and enforced in a court of equity, as it would have been before the statute. When uses were raised by conveyances at common law, operating by transmutation of possession, the uses declared in such conveyances did not require a consideration. The real owner had divested himself of the legal estate; and the person in whom it was vested, being a mere naked trustee, equity held him bound in conscience to execute the directions of the donor. If there were no uses declared and no consideration, the use resulted to the feoffor or releasor; for under such circumstance it would not be presumed that the feoffor or releasor intended to part with the use. In case of covenants to stand seized, and of a bargain and sale, prior to the Statute of Uses, the inheritance remained in the contracting party. In such case the transaction was a mere contract which required either a good or a valuable consideration, without which it would not be enforced by a court of equity. (4 Kent's Comm.) Where, however, the covenant to stand seized, or bargain and sale, was supported by a proper consideration, there can be no doubt that a court of equity would, and now should, contemplate the actual rights of the parties, and construe the instrument in such manner as to effectuate their intention. Ad-

mitting the instrument cannot be enforced as a grant, it is a contract on the part of the bargainor to transfer the whole legal estate to the bargainee, and on the part of the latter to convey a life estate to the former. The decree might have provided for appropriate conveyances to carry out the evident purpose of the agreement.

Nor is it necessary to decide whether the English Statute of Uses was adopted in this State as a portion of the common law. If the clause in the deed may be construed as a declaration of trust by *defendant*, and the effect of the statute was to transfer the life estate to *cestui que use*—or if its effect was to give a life estate to the bargainor, with remainder in the bargainee—or if, by any other theory as to the effect of the statute, the use and legal title were united during the life of plaintiff, a court of equity, to whom the whole matter has been submitted, has power to settle and determine the actual rights of the parties, and prevent future complications, by decreeing a formal conveyance of the fee from plaintiff to defendant, and a reconveyance for the life of the former by the latter. In our opinion this should be done. (See *Sherman* vs. *Estate of Dodge*, 2 Wms., Vt., 26.)

The order denying a new trial is affirmed. The judgment is reversed, and the Court below is directed to enter a decree in accordance with the foregoing opinion.

We concur: Ross, J., McKee, J.

IN BANK.

[Filed July 28, 1880.]

[No. 10,521.]

PEOPLE, RESPONDENT, vs. T. A. SPRAGUE, APPELLANT.

REMITTITUR issued regularly will not be recalled.

Appeal from the Superior Court, Ventura County.

A. L. Hart, Attorney-General, for respondent.
Creed Haymond, for appellant.

By the Court:

The remittitur on the former appeal having been regularly issued without inadvertence, we have no power to recall it; therefore the motions that the remittitur be recalled and a bill of exceptions be settled are denied, and the order appealed from is affirmed.

Remittitur forthwith.

DEPARTMENT NO. 2.

[Filed July 21, 1880.]
[No. 6472.]

M. W. DE CARRILO, GUARDIAN, ETC., RESPONDENT,
vs.
JOHN McPHILLIPS, APPELLANT.

PROMISSORY NOTE. The beneficiaries of a note given for a trust may follow it into the hands of any person who took it with notice of the trust.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Bicknell & White, and *Howard, Brousseau & Howard*, for respondent.

Bronson & Wells, for appellant.

SHARPSTEIN, J., delivered the opinion of the Court:

On the 6th of August, 1874, O. W. Childs and five other persons made their promissory notes in writing, by which they promised: "On or before the day of the date of the minor children of John Rains, deceased, becoming of age, to pay to Joseph S. Garcia, or order, for the benefit of said children, the sum of $10,000, United States gold coin, with interest from the 1st day of September, 1874, until paid, at the rate of ten per cent. per annum, payable only every three months." Garcia afterwards, in the same year, endorsed, transferred, and delivered said note to the plaintiff; and she afterwards, on the 17th day of April, 1877, endorsed and delivered said note to the defendant herein as collateral security for the payment of a note of her own, made and delivered to the defendant on the same day. On the 17th day of April, 1878, the plaintiff was duly appointed guardian of the children of said John Rains, deceased; and after her said appointment, and before the commencement of this said action, she demanded of the defendant, and he refused to deliver to her, the possession of said note.

The Court found that she was entitled to the possession of it, and rendered judgment accordingly. From that judgment and an order of the Court denying the defendants' motion for a new trial this appeal was taken.

That Garcia violated his trust we have no doubt, and it was optional with the beneficiaries to look to him for the value of the property, or to follow it into the hands of any person who took it with notice of the trust. As it appears on the face of the note that he held it only as a trnstee, no one could take it in ignorance of the trust. As the bene-

ficiaries are infants and have a guardian, we think that the latter can maintain any action now for the recovery of the note that the beneficiaries if of age could.

Judgment affirmed.

We concur: Thornton, J., Myrick, J.

DEPARTMENT NO. 2.

[Filed July 24, 1880.]

[No. 6560.]

PIO PICO, APPELLANT,

vs.

WOLF KALISHER, RESPONDENT.

FINDINGS. Findings must be based upon the issues.

Appeal from the District Court of the Seventeenth Judicial District, Los Angeles County.

Glassell, Chapman & Smith, for appellant.

Bronson, Eastman & Graves, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This judgment must be reversed. The evidence shows conclusively that the property was taken by the defendants from the possession of plaintiff's assignors, but the Court finds that it was not. There was some evidence admitted which tended to prove that the property was taken by virtue of an attachment or execution, although none of the defendants pleaded that it was so taken. They simply denied the taking. If the defendants or any of them had alleged that the taking was by virtue of an attachment or execution, the judgment would have to be reversed for want of a finding upon that issue. It is unnecessary to state that the defendants are in no better position now than they would be if they had justified in their answer their taking under an attachment or execution. The finding that there was no taking of the property by the defendants is clearly erroneous. If they lawfully took it, and the Court based its judgment upon that ground, the Court should have so found. Under the pleadings, no evidence, except as to the ownership of the property and the taking thereof, was admissible. Some evidence tending to prove a justification was admitted against the plaintiff's objections, but his counsel for some reason failed to have any exceptions to those rulings noted.

Judgment reversed, and cause remanded for a new trial.

We concur: Thornton, J., Myrick, J.

In the Superior Court

OF THE STATE OF CALIFORNIA, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO (LATE NINETEENTH DISTRICT COURT).

DEPARTMENT 2.

[No. 6471.]

JOHN H. BURKE, PLAINTIFF,

vs.

JAMES C. FLOOD, AND JAMES C. FLOOD AND JAMES V. COLEMAN (EXECUTORS OF THE LAST WILL AND TESTAMENT OF WM. S. O'BRIEN, DECEASED), AND THE CONSOLIDATED VIRGINIA MINING COMPANY, DEFENDANTS.

Judge Nathaniel Bennett, S. W. Holladay, and *John Trehane,* for plaintiff.

McAllister & Bergin and *C. J. Hillyer,* for defendants.

SULLIVAN, J.: This is a bill in equity, filed by John H. Burke, a stockholder in the Consolidated Virginia Mining Company, on behalf of himself and such other stockholders in said corporation as may become parties, against James C. Flood and the representatives of Wm. S. O'Brien, charging said Flood and O'Brien with the fraudulent misappropriation of stocks belonging to said corporation. The corporation is also made a defendant.

The complaint alleges that in April, 1872, the defendants Flood and O'Brien were partners of J. W. Mackay and J. G. Fair, and the said partnership purchased from one Geo. W. Kenney twelve and one-twentieth feet of mining ground, the purchase being made through Solomon Heydenfeldt, in whose name the deed was taken.

It is claimed that the consideration paid was a sum of $1,250, and that said purchase was made by said partnership with the intent of selling the land to the corporation.

It is stated also that Flood and O'Brien, at the time of the combination formed for the purchase and sale of the land aforesaid, were trustees of said corporation, and that from that time up to the commencement of this action the other directors of said corporation were controlled by and in the interest of the defendants Flood and O'Brien.

The consideration paid by the company is alleged to be 120½ shares of the capital stock of the corporation, the market value of which at the date of the transaction was $18,000. The plaintiff thus claims that said partners bought said prop-

erty for $1,250 dollars, and sold it to the corporation, of which two of them were directors, at an advance of $16,750. That such action on the part of Flood and O'Brien was in violation of their trust as directors, and a fraud on the corporation defendant and its stockholders. The highest market value of the said 120½ shares of stock, which was reached in January, 1875, is stated to be $1,398,080. The dividends declared on the same, up to the commencement of this action, are claimed to be upwards of $600,000. The plaintiff demands that said defendants account to the said corporation for all the said stock and dividends, and that they be allowed merely the money actually expended in the purchase of said mining ground.

Three other similar circumstances are set out in the complaint, and plaintiff avers that the aggregate amount realized by the defendants on the stock issued to them at the time of the several sales to the company is $10,498,068, which sum the plaintiff prays the defendant be compelled to account for to the company.

It is alleged that demand was made on the corporation to bring this action, and that the corporation refused to sue; and it is claimed that such refusal is due to the corporate control exercised by the defendants over the present directors of the corporation.

The complaint is demurred to by all the defendants, including the corporation, on numerous grounds; but the grounds more especially relied on are the following: 1. That the complaint does not state facts sufficient for cause of action. 2. That said complaint shows no facts entitling the plaintiff to the relief, or authorizing him to maintain the action.

The general rule governing actions of this character is that a suit brought for the purpose of compelling the ministerial officers of a private corporation to account for a breach of official duty or misapplication of corporate funds, should be brought in the name of the corporation, and that under ordinary circumstances it cannot be brought in the name of the stockholders, or in the name of some of them. (Angell and Ames on Corporations, Section 312, and the authorities there cited.) That where it is claimed that the directors of a corporation refuse to prosecute by collusion with those who have made themselves answerable by their negligence or fraud, or where the corporation is still under the control of those who must be defendants in a suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation party

defendant. The reason given for this rule is that otherwise a minority of the corporation would be completely at the hands of a corporate majority; and official misconduct, malfeasance, and fraud would be encouraged and protected by the forms of law. But it was well said in the case of *Robinson* vs. *Smith*, that courts of equity never permitted a wrong to go unredressed merely for the sake of form. The same doctrine is laid down in *Hichings* vs. *Congrieve*, 4 Russell, 462.

In the case of *Hazard* vs. *Durand*, 11 R. I. 206, the Court says the jurisdiction does not appear to be so firmly settled and defined in England as in this country; but we do not believe that any English Judge has ever decided that a president or director who fraudulently diverts or embezzles corporate funds cannot be sued in equity by a stockholder, when the corporation willfully neglects or refuses to bring the suit. Indeed, to hold that a corporation could gratuitously condone or release such a fraud by anything short of unanimous consent would be monstrous. It would be in effect to hold that a president or director who can control a majority vote in the corporation may rob or despoil with impunity. There are numerous American cases which hold that in such circumstances a stockholder may sue for himself and other stockholders, making the corporation a co-defendant with the guilty parties. (See *Verplank* vs. *Mercantile Insurance Co.*, 1 Edward Ch. Rep. 84; *Cunningham* vs. *Peel*, 5 *Id.* 607; *Hodges* vs. *New England Screw Company*, 1 R. I. 212; Spearing's Appeal, Penn. State Rep. 1.)

Some authorities controvert the doctrine here laid down, notably so in the case of *The United States* vs. *The Union Pacific Railroad*, 98 U. S. 599. These cases lay down the doctrine that while a stockholder may maintain an action individually against the guilty parties, he has no right to represent the corporation, and to bring it unwillingly into Court to conduct a litigation for the purpose of recovering its property from its faithless officers. How this relief could be effectually administered without an accounting I cannot readily see. At all events, the vast preponderance of authority of fundamental equity jurisprudence sustains the rule above laid down.

The doctrine laid down in *Robinson* vs. *Smith*, cited above, is approved in the case of *Neal* vs. *Hill*, 16 Cal. 151, and *Wright* vs. *The Oroville Mining Co.*, 39 Cal. In the latter case, Wallace, Justice, uses this language: "But the courts of equity, in dealing with the relations between a corporation and its officers on the one hand, and the stockholders on the other, in the management of its corporate officers, look

beyond the mere observance of the forms of law, and inquire if the authority has been exercised in good faith—exercised to promote the interest of the stockholders. The corporate authority is considered to have been conferred by the stockholders on the trust and confidence that it will be exerted at least with a view to advance the interest of the stockholders, and not used with a purpose to injure or destroy that interest. And it is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of the corporate authority, if such acts where done would, under the particular circumstances, amount to a breach of the very trust upon which we have seen the authority itself has been conferred. And upon the same principle the Court will, even after such an act has been done, relieve injured stockholders from loss, if in the meantime no superior equity has intervened, nor the rights of innocent third parties are attacked." (See also *Rogers* vs. *Lafayette Agricultural Works*, 37 Ind. 305; *Cogswell* vs. *Bull*, 39 Cal. 324; *Parrott* vs. *Byers*, 40 Cal. 625; *Greeves* vs. *Gouge*, 56 Howard's Practice, 272.) The plaintiff has standing, therefore, and has the capacity to maintain an action in a proper case.

Does this complaint show a case in which the defendants should be called upon to answer? In the light of the decisions in California and elsewhere, I think it does. (*San Diego* vs. *San Diego and Los Angeles Railroad*, 44 Cal. 112; *Wilbur* vs. *Lynde*, 49 Cal. 292; *Farmers and Mechanics' Bank of Los Angeles* vs. *Downey*, 53 Cal. 466.)

Defendants claim that the bill shows an acquiescence in, and ratification of, the alleged fraudulent acts. I do not think that such appears on the face of the complaint, and the Court is not allowed otherwise to presume it.

In the separate demurrer of the executors of O'Brien, it is urged that plaintiff cannot maintain the action, because no allegation is made of presentment of the claim to the executors of O'Brien, deceased.

Section 1493 of the Code of Civil Procedure is relied on in support of this position. That section refers by its terms to claims arising on contract, and does not extend to claims founded on tort. It does not embrace the right to file a bill in equity to obtain an accounting. (*Lathrop* vs. *Bampton*, 31 Cal. 24; see also *Gunther* vs. *Janes*, 9 Cal. 643.)

From these views it follows, in my judgment, that the demurrer should be overruled, and it is so ordered.

Twenty days will be allowed to answer.

New Law Publications.

TREATISE ON THE LAW OF EASEMENTS. By JOHN LEYBOURN GODDARD, of the Middle Temple, Barrister at Law. Much enlarged from the second English edition of 1877, by EDMUND H. BENNETT, LL.D., Professor of Law in the Boston University. Boston: HOUGHTON, MIFFLIN & Co., 1880; pp. 542.

This work is from the Riverside Press, Cambridge, and that fact alone will be sufficient to satisfy the most exacting mind as to qualities of binding and typography. It presents a handsome appearance.

Mr. Goddard's treatise was first written in 1871, and reached a second edition in 1877; and upon the high judicial authority of Lord Cockburn, it is "a learned and able treatise." It discusses the subject in a natural and philosophical order—treating, first, of the definition and nature of easements; second, of the various methods of acquiring them; third, of the mode and extent of their enjoyment; fourth, of their disturbance, and the remedy therefor; lastly, how they may be lost or extinguished. In this edition the plan of the original has been followed, the American law being sometimes interwoven into the text, and sometimes added in a separate chapter or section, as the subject seemed to require. Although the subject of easements is largely controlled by statute, this work is essential to explain the meaning and reason of the law, without which there can be no correct basis for sound judgment.

AMERICAN CRIMINAL REPORTS. A series designed to contain the latest and most important criminal cases determined in the Federal and State Courts in the United States, as well as selected cases important to American lawyers from the English, Irish, Scotch, and Canadian law reports. With notes and references. By JOHN G. HAWLEY, late Prosecuting Attorney at Detroit. Vol. II. Chicago: CALLAGHAN & COMPANY, 1880; pp. 691.

This is a very attractive volume, containing one hundred and thirty-seven well-selected cases, extending over the whole range of criminal jurisprudence passed upon by courts of last resort of recent date. Many hundred criminal cases are cited and referred to in the context. There has been great need of leading criminal cases brought down to recent times, to fit the various changes in our criminal procedure; and a careful examination of this second volume satisfies us that Mr. Hawley's efforts have been attended with success.

The case of *The State* vs. *Kent*, on page 107, appears to us a singular case. The defendant was collector of pew rents for a church corporation, and acted as such under a special and express agreement, by which, as compensation for his services, he was to have "five per cent. of all the pew rents, no matter who collected them." The effect of this agreement was to vest in de-

fendant an undivided one-twentieth interest in the rents collected, and to that extent to make him an owner of the same, jointly with the corporation. The rents, therefore, were not the property of *another* than the defendant; and hence the latter was not properly indictable for his alleged embezzlement and fraudulent conversion of the same, or any part thereof.

The case of *The State* vs. *Walls* (page 23) was a bribery case, in which the defendant, who was a prosecuting attorney, consented to be influenced in favor of two parties who were under indictment for a felony, receiving for such influence a promissory note in the sum of twenty-five dollars. The Court held that, as a note executed to a public officer to improperly influence his official conduct is not only without a valid consideration, but is against public policy, and hence utterly void, the defendant could not be convicted of bribery, because he had received nothing of sufficient value to constitute an undue reward within the meaning of the statute.

A very interesting case is that of *The State* vs. *Winthrop* (page 274), which covers the law of homicide in relation to the independent life of a new-born infant.

The cases relating to "former jeopardy" and "homicide" are numerous and full; in fact, there is not one case in the book unworthy the careful study of the practitioner and student.

NEVADA REPORTS, VOL. XIV. Reports of cases determined in the Supreme Court of the State of Nevada during 1879 and 1880. Reported by CHAS. F. BICKNELL, Clerk of the Supreme Court, and Hon. THOMAS P. HAWLEY, Associate Justice. San Francisco: A. L. BANCROFT & Co., 1880; pp. 500.

This volume of Nevada Reports comes to us prefaced with the Rules of the Board of Pardons and of the Supreme Court. The typography is unexceptionable, but the binding does not present as smooth and well finished an appearance as our enterprising publishers usually present us with.

It appears that the monotonous facial expression of the "Heathen Chinee" perplexes the citizens of Nevada as well as of our own State, and compelled the Court, in the case of *State* vs. *Ah Chuey* (page 79) to use forcible means in compelling the defendant to exhibit private tattoo marks upon his person, to put his identity beyond the cavil of a doubt. The grieved Chinaman availed himself of his constitutional privilege, and appealed to the Supreme Court on the ground that he had been compelled to be a witness against himself. The point called forth all the learning of the Court, which finally sustained the action of the Court below, although the dissenting opinion of Justice Leonard took strong ground in favor of the point made by the defendant.

Gaston and Drake, on page 176, were law partners. The latter was a candidate for the office of District Attorney, and agreed

with his partner (Gaston) that if he would use all his influence and aid in the election of Drake, the latter would divide the salary, fees, and emoluments of the office. Drake was elected, and found the office so remunerative that he neglected to divide with his partner as he agreed; hence the suit. The Court held that the agreement was contrary to public policy, in contravention to the election law of the State, and wholly void.

In the case against John Davis (page 439) it appeared that Davis was a prisoner in jail, and found the premises so filthy, unwholesome, and loathsome that he changed his quarters by going out through the prison door, which he found unlocked. But the Court held that he had no right to escape from his unpleasant quarters without first notifying the Sheriff or the Board of County Commissioners that they must relieve him from the discomforts of his situation in accordance with the rule laid down by Story. (See Bishop on C. L., Vol. I, Sec. 352.) "He is not permitted, as in cases of insurance, to seek a port to repair, merely because it is the most convenient."

COMMENTARIES ON MORTGAGES AND VENDORS' LIENS. By HENRY M. HERMAN. Vol. I. Albany: W. C. LITTLE & Co., 1880; pp. 790.

It does not detract from the merits of this work that it is dedicated to Justice Stephen J. Field, of whom he says, "*Animo vidit, ingenio complexus est, eloquentia illuminavit.*"

The author, beginning with a definition, gives the history of mortgages from the time of the Mosaic lawgiver to the present time, and the character of mortgages in all nations. His object in these Commentaries is the unification of a system of pledging or mortgaging property, and from the mass of contradictory cases to deduce principles applicable to the subject. The work is a complete index, not only of reports, but of legal journals; and the citations are all the more numerous because the author believes that all of the reports are inaccessible to the greater portion of the bar. The subdivision of each volume is into books and chapters, each book or part being intended to be a complete subdivision of the subject.

The common law status of married women is deprecated, but it is claimed that the remedy must be found with the law-making power until that power exercises its prerogatives. So far as providing for the emancipation of women is concerned, the rights of the latter must necessarily be construed in accordance with the statutes as they now exist. The author regards these rights of women as one great difficulty in the way of the establishment of any settled principles upon matters connected with the system of mortgaging. He claims, as in his work on chattel mortgages, that it will not be long ere all mortgages are placed upon their true basis—that of mere liens or hypothecations—and the rights of the parties to the contract judicially determined.

TREATISE ON CHATTEL MORTGAGES. By HENRY M. HERMAN. Albany: W. C. LITTLE & Co., 1880; pp. 666.

The author is well known to the legal fraternity through his treatises on the laws of Estoppel, Executions, Real Estate Mortgages, etc.

Although the author disclaims perfection in utilizing the mass of matter which had been collected, and only hopes that he has established a foundation for the efforts of some abler mind, we are impelled to the conviction that he has rendered invaluable service to the profession in his orderly arrangement of the chaos of decisions upon the class of securities referred to in the title.

Beginning at the nature and origin of chattel mortgages, he brings the reader step by step carefully and clearly through a labyrinth of overruled cases, impressing upon the mind the *reason* of the law—without knowing which, no man can be said to be learned in law.

The author considers that the harsh doctrines of the common law are being constantly and gradually relaxed and modified, while the civil law rules are reaffirmed in the later and better considered cases; and chattel mortgages without change of possession, instead of being fraudulent *per se*, are, under registration laws, regarded as eminently proper. The wisdom and enlightenment of modern jurists coincide with the view that a chattel mortgage is a mere contract of hypothecation—a mere security—and that a mortgagee's rights are no greater after condition broken until, by foreclosure, he has rendered his security available to the satisfaction of his debt.

The work before us contains copious references and citations to the civil and common law, the statute law, and decisions of all the States, including Federal decisions, down to a recent date.

A DIGEST OF THE REPORTS OF THE UNITED STATES COURTS AND OF THE ACTS OF CONGRESS, FROM JULY, 1877, TO MAY, 1880. By BENJAMIN VAUGHAN ABBOTT. Vol. VIII. Being the fourth supplement to Abbott's National Digest. New York: GEORGE S. DIOSSY, 1880; pp. 636.

The publisher has given to the legal fraternity a handsome volume, uniform with the set, but in our opinion in better shape as to quality of binding.

It is unnecessary for us to criticise Judge Abbott's work. The result of his labors has been so long before the public that it suffices for us to say that in this volume there has not been any falling away of excellence, but rather an improvement. Cases from law magazines are cited; and besides the general alphabetical arrangement, a table of cases and index of heads are added. The digest is compact, and in every respect satisfactory.

A TREATISE ON THE LAW OF REPLEVIN, AS ADMINISTERED IN THE COURTS OF THE UNITED STATES AND ENGLAND. By H. W. WELLS. Chicago: CALLAGHAN & Co., 1880; pp. 493.

This book comes to us in excellent shape, both as to typography and binding; and, although containing over five thousand references, and citing over three thousand authorities, covers the whole subject in a necessarily brief but complete manner.

The action of replevin, or our action of claim and delivery, as to its origin, is lost in the mists of antiquity. It was, however, one of the earliest remedies given by the common law. Granvil, the earliest writer on the laws of England, gives this writ as it was in his time, and as it must have existed before; and there can be no doubt that it was in existence before the chancery was known. It made its first appearance as a part of the *lex scripta* in the statute of Marlbridge (so called from Marlborough, in Wiltshire, where King Henry III. held a Parliament in November, 1267), 52 Henry III., A. D. 1267, 21st chapter; other chapters of which statute relate to the subject of distress, an action closely allied to replevin in the ancient law, and forms a part of the famous *Magna Charta*.

Mr. Wells meets with many difficulties in accomplishing his task, on account of the differences in local laws; but by careful attention to those differences, and constant citations, he seeks to preserve a unity, and afford a *modus decidendi* for the numerous questions that may arise. This action has been so changed, or rather modified, from its ancient meaning that it would hardly be recognized at the present day, on account of the varied circumstances brought about by changed occupations, were it not for the unity of reason which underlies the modern system. The author aims to obviate all contrarieties and conflicting decisions, by showing the reasons paramount in the diverse local laws—which in the main do not differ from the original ideas of the writ—by copious citations; and in this, judging from a cursory examination of the work, we think he has succeeded.

THE LAW AND PRACTICE IN COURTS OF PROBATE UNDER THE STATUTES AND DECISIONS OF THE SUPREME COURTS OF WISCONSIN AND MINNESOTA. With references to the decisions in Michigan, Massachusetts, and other States where a similar system prevails, etc. With over two hundred forms, prepared under the Revised Statutes of Wisconsin of 1878. By GEORGE GARY. Chicago: CALLAGHAN & Co., 1879; pp. 574.

Although this work is of local application, it should be considered of value for general perusal, since there are probably no courts of probate anywhere that have a more extensive jurisdiction than the County Courts of Wisconsin and Probate Courts of Minnesota, excepting California. These courts of probate touch the home life of the people more than any other—reaching

into their families, following the track of death, and once in every generation attaching to and acting upon the accumulated wealth of the country. In view of the fact that legislation on the subject of wills, administration, distribution, and descent of estates, in most of the United States, is founded upon the old English statutes and the practice of the ecclesiastical courts, the many references to English statutes and reports in this work make it important to the profession. The general appearance of the work is very creditable to the publishers.

PRINCIPLES OF CRIMINAL LAW. By SEYMOUR F. HARRIS, B.C.L., M.A. (Oxon.) With additions and notes adapting it to the American Law, by M. F. FORCE, Professor of Equity and Criminal Law in the Cincinnati Law School. Cincinnati: ROBERT CLARKE & Co., 1880; pp. 460.

This is one of the many standard English authors, Americanized by an able editor. While there is no lack of works on criminal law, there is certainly room for such a useful handbook of principles as the above. Although especially a valuable work for law students, it is of great use to the profession on account of its concise exposition of the nature of crime, and the law of criminal procedure. Enough is said to enable the mind to grasp all the points, and all tendency to obscurity is obviated in clear and plain language. Judge M. F. Wilson, author of "Ohio Criminal Code," whose opinion possesses great weight, says of it: "As a general introduction to the subject of criminal law and criminal procedure, it is the best book in existence."

PRINCIPLES OF THE LAW OF CONTRACT. By Sir WILLIAM R. ANSON, Bart., M.A., B.C.L. Edited and annotated with American Notes, by O. W. ALDRICH, LL.D., Professor of Law in Illinois Wesleyan University. Chicago: CALLAGHAN & Co., 1880; pp. 377.

This book is designed for the use of students, and is arranged with great simplicity and clearness, and in our opinion well calculated to be a stepping stone to the more complex and intricate works on contracts. The American edition has been changed by leaving out those portions based upon late English statutes, and substituting the common law rules instead. Many American cases are cited, with a view to enable the student to verify the text; and where the rule given in the text is denied by any or all of the American courts, this dissent has been expressed in foot notes. We recommend the work as an introductory one, and feel justified in commending the publishers for their enterprise in bringing out this and other law books in such excellent shape and clear typography.

Legal Facetiæ.

AN Irish drummer who now and then indulged in a noggin of poteen was accosted by the reviewing general: "What makes your nose so red?" "Plaze yer Honor," replied Pat, "I always blush when I spake to a gineral officer."

***

IN a case in Connecticut recently the Judge ruled that certain evidence was inadmissible. The attorney took strong exceptions to the ruling, and insisted that the offered evidence was admissible. "I know your Honor," said he warmly, "that it is proper evidence. Here I have been practicing at the bar for forty years, and now I want to know if I am a fool?" "That," quietly replied the Court, "is a question of fact and not of law, and so I won't pass upon it, but will let the jury decide."

***

A SCOTCH ADVOCATE writes a pleasant letter to a New York journal concerning the peculiarities and traditions of his profession. "I find," he says, "that nothing interests an American so much as my wig. I only wish the person who thus derives amusement from the fashion had to experience its inconvenience. To begin with, they are by no means cheap. A horse-hair wig costs about $50, and an ordinary one—they are now all made out of whalebone shavings—about $30. They very soon get dirty, and to powder them, as some men used to do, only makes one's coat perpetually greasy. Then in summer they are hot and tight on the head. Yet we all wear them. We are not compelled to do so. We must wear a gown; that is our mandate. The abolition of the gown I should regret. Its several parts involve not a little curious history. For instance, we carry at the back of the gown a little pocket, which, though still worn, is now sewn up. That appendage takes you back more than 300 years, to the days before the Reformation, when the advocates were churchmen. No churchman was allowed to accept a regular payment for his services; but if he was prohibited from handling the money, that was no reason why you, if you wanted your case particularly attended to, should not put a couple of gold pieces into the bag which he carried at his back. So you see we still have some relics of the past surviving in this reforming age. Many of our names even strike a stranger as peculiar. The official head of the bar is called 'Dean of the Faculty.' 'Ah,' said Sidney Smith, when he heard the title for the first time, 'that's very odd now. With us in England our deans have no faculties.' Absurd as these old customs and names may be, it cannot be denied that the country has reason to be proud of her judicial arrangements, not merely in the Supreme Court, but down to the humblest judicatory."

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